

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**SHEEHY ENTERPRIZES, INC.**

and

**Case No. 25-CA-30583**

**LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,  
STATE OF INDIANA DISTRICT COUNCIL, a/w LABORERS'  
INTERNATIONAL UNION OF NORTH AMERICA**

*Rebekah Ramirez, Esq.*, Counsel for the General Counsel.  
*Neil Gath, Esq., Fillenwarth, Dennerline, Groth & Towe, LLP*, Counsel for Charging Party.  
*David Swider, Esq., Bose, McKinney & Evans*, Counsel for Respondent.

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** This case was heard by me on July 21, 2008 in Indianapolis, Indiana. The Complaint herein, which issued on April 30, 2008 and was based upon an unfair labor practice charge that was filed on January 24, 2008 by Laborers' International Union of North America, State of Indiana District Council, a/w Laborers' International Union of North America, herein called the Union, alleges that Sheehy Enterprizes, Inc., herein called the Respondent, granted recognition to, and entered into a Section 8(f) collective bargaining agreement with, the Union, but subsequently refused to adhere to, and repudiated the agreement that it had agreed to be bound by, in violation of Section 8(a)(1)(5) of the Act.

**Findings of Fact**

**I. Jurisdiction**

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

**II. Labor Organization Status**

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

**III. The Facts**

Respondent, a concrete construction company operating in the Indianapolis, Indiana area, is owned by James Sheehy, herein called Sheehy, and his wife. While a majority of the jobs performed by the Respondent are nonunion jobs, Respondent also contracts to perform work on union and Davis-Bacon jobs. In October 2003 the Respondent was installing concrete curbs at a job at Purdue University in Indianapolis, herein the IUPUI jobsite. David Frye, Business Manager for the Union, testified that on October 15, 2003, he observed employees of the Respondent performing concrete work at the IUPUI jobsite. He spoke to Danny Arnold, the

superintendent for Wilhelm Construction, which is a signatory to its contract, to inform him that the Respondent was a nonunion contractor and therefore Wilhelm was in violation of the agreement which prohibits subcontracting work to nonunion companies. Arnold told Frye to give him a day to talk to Sheehy. On the following day Frye returned to the IUPUI jobsite and Arnold told him that Sheehy was willing to talk to him about signing an agreement. Frye met with Sheehy who questioned him about the work that he had that was ongoing at the time. Frye told him that any work that was ongoing or had been bid on prior to October 16, 2003, "would not be a concern [of the Union]", but any work from that day forward would be under the collective bargaining agreement. Sheehy then signed the Acceptance of Working Agreement, effective from April 1, 1999 to March 31, 2004, which states:

The undersigned has read and hereby approves the Contractors-Laborers' Working Agreement by and between the State of Indiana District Council of the Laborers' International Union of North America and the Labor Relations Division of the Indiana Constructors, Inc. operating in the State of Indiana and herewith accepts same and becomes one of the Parties thereto. Any deletions, exceptions or alterations to this Acceptance will be void and of no force or effect.

Sheehy signed the Acceptance Agreement as president of the Respondent, listing the Respondent's office address and telephone number. Frye gave Sheehy a copy of the signed Acceptance, as well as a copy of the current contract between Indiana Constructors, Inc., Labor Relations Division, herein the Association, and Local Unions of Laborers' International Union of North America, State of Indiana District Council, herein the District Council, effective from April 1, 1999 to March 31, 2004. After Sheehy signed the Acceptance Agreement Frye went to some of the Respondent's employees who signed to join the Union and its health and welfare plan.

Sheehy testified that while the Respondent was working at the IUPUI jobsite, he was told by Frye that he needed to sign up with the Union or leave the job. Frye gave him an Acceptance of Working Agreement and he signed it on October 16, 2003. He testified<sup>1</sup>: "I thought we were talking about a job-specific contract," and that nothing that Frye said indicated to him that by signing the Respondent was bound to the Union contract for all its jobs. He also testified that Frye told him that work that he had previously bid would not be covered by the contract. Frye testified that the Union does not allow employers to sign one-job only contracts.

On May 21, 2004 Sheehy signed an Acceptance of Working Agreement that is identical to the one that he signed on October 16, 2003, except the latter one is effective from April 1, 2004 through March 31, 2009, as is the agreement that the Acceptance Agreement provides that he is bound to. He testified that he believed that this was another "job-specific contract," rather than an agreement binding him for all jobs performed by the Respondent. He further testified that, although he signed the Acceptance Agreements in 2003 and 2004, he does not believe that he ever received the contracts that these Acceptance Agreements bound him to honor. In fact, he testified that at the time of the hearing he had not read the latest contract. He also testified that in July or August 2004, after he had completed the IUPUI job, he was called on a number of occasions by Frye saying that he wanted to help the Respondent on their projects. When Sheehy asked what he was getting at, "That's when he informed me or made me aware of the fact that...we were obligated as a union contractor to pay union dues on

---

<sup>1</sup> At the hearing I allowed testimony from Sheehy about his impression of the Respondent's obligation upon signing this and the later Acceptance Agreement. As will be discussed, *infra*, because the Acceptance Agreements and the collective bargaining agreements that he agreed to be bound by are unambiguous, this parol evidence will not be considered.

whatever project that we are working on.” Sheehy told Frye that he would be happy to do that on union jobs, but he could not afford to do it on his nonunion jobs.

The Respondent paid to the Union’s Fringe Benefit Fund Office for a period beginning in November 30, 2003. At that time the Respondent paid \$1,565 for three employees; for the period ending December 31, 2003, the Respondent paid \$206 for one employee; for the period ending May 31, 2004, the Respondent paid \$868 for three employees and for the period ending July 30, 2004, it paid \$4,000 for four employees. That was the last payment that the Respondent made to any of the Union’s funds. In addition, in May and July 2004 these four employees executed checkoff authorizations and Welfare Fund Beneficiary Designation Forms.

Frye testified that on November 1, 2007 he received a telephone call from Union Business Agent Dwight Smith telling him that he saw Respondent’s employees performing concrete curb work at a Walmart construction site at 4600 Lafayette Road in Indianapolis. Frye told Smith that the Respondent had a contract with the Union and he should sign up any of the Respondent’s employees who was not already a Union member. Shortly thereafter, Smith called him to say that Sheehy did not agree that he was a union contractor, and Frye asked to speak to Sheehy and Smith put him on the phone. Sheehy asked him what was going on and Frye said that he had a contract with the Union. Sheehy said that they did not have a contract, they only had a one-job agreement for the IUPUI job and Frye said no, the Union never signs one-job agreements; they had a favored nations clause in the contract that does not allow for one-job agreements. They “bickered” for a few minutes about the subject and Sheehy said that he would not comply with the contract, but was willing to work something out on that job for Power and Son, a Union contractor. Frye told him that there was nothing to work out, they had a contract and, as far as he was concerned, it was worked out. Frye then told him that he had two choices: he could file a grievance or he could turn the issue over to his attorney. Sheehy said that since he had no contract with the Union he had nothing to abide by and, because of what Sheehy said, Frye decided that the best course would be to turn it over to his attorney. By letter dated November 7, 2007, Neil Gath, counsel for the Union, wrote to Sheehy stating that on May 21, 2004 he agreed to be bound to the Union’s contract, but that he had recently repudiated that contractual obligation. Counsel concluded by saying that unless Respondent agreed to follow the contract, the Union would file an unfair labor practice charge. There is no evidence of a response from Sheehy, and a charge was filed with the Board on January 24, 2008.

Sheehy testified that when he met Smith at the Walmart jobsite on November 1, 2007, Smith “was pretty emphatic about signing up all our guys...” Sheehy told him that he was not to do that and Smith called Frye and gave the phone to Sheehy. Frye told Sheehy that he was bound to their contract for all his jobs and that he was obligated to pay Union dues and benefits for all his jobs going back to May 2004. He replied that he didn’t feel that he was bound to it, but that he was willing to work out something for the Walmart job.

Respondent produced testimony to establish that from the middle of 2004 to November 2007 it was operating as it normally does, out in the open without making any attempt to conceal its operations. Frye testified that for the period May 2004 through November 1, 2007 he was not aware of any jobs that the Respondent was performing in the Union’s jurisdiction in the Indianapolis, Indiana area. Beginning in July 2006, the Union received fringe benefit update reports which did not list any contributions made by the Respondent, but Frye did not take any action against the Respondent based upon these reports. Frye testified that it was not until Smith saw Respondent at the Walmart jobsite on November 1, 2007 that he was aware that they were working in the area. Sheehy testified that the Respondent owns six trucks and five job trailers, and each has the Respondent’s name and telephone number on both sides of the vehicles. He has never tried to hide the fact that he is working on particular jobs: “No and just

the opposite, we're trying to let people know we are there. Repeat business is pretty pivotal to our growth."

The 1999 and 2004 contracts are identical in their relevant provisions. The Work Covered provision includes all work within the recognized jurisdiction of the International Union in highway construction, heavy construction and railroad contracting, utility construction and related work, and it covers all construction labor employees of the signatory employers, with the exception of warehouse or yard employees, superintendents, master mechanics, mechanics, job foremen, civil engineers or clerks. Article III, Bargaining Agent, states:

For the purpose of collective bargaining with respect to wages, hours, and other conditions of employment, the Employer recognizes the Union as the sole and exclusive bargaining agent of all his Employees in a unit consisting of construction laborers who are employed by the Employer on all work and classifications set forth in this Agreement.

Article IV, Union Security, states, *inter alia*:

The Contractor, or Employer, recognizes and acknowledges that the Laborers' International Union of North America, State of Indiana District Council, is the sole representative of all Employees in the classification of all work under its jurisdiction covered by this Agreement for the purposes of collective bargaining.

#### IV. Analysis

The agreements executed by the Respondent in 2003 and 2004 were Section 8(f) agreements and, prior to *John Deklaw & Sons*, 282 NLRB 1375 (1987), such agreements could be repudiated by either party and could not be enforced under Section 8(a)(5) of the Act. *Deklaw* changed that by declaring that permissible Section 8(f) agreements were enforceable, could not be repudiated prior to their termination dates and were enforceable under Section 8(a)(5) of the Act. Whether it is fair to bind the Respondent and his employees to such an agreement, as counsel for the Respondent argued at the hearing and in his brief, is irrelevant. The Respondent signed two Section 8(f) agreements and is bound to their provisions. *P & C Lighting Center, Inc.*, 301 NLRB 828 (1991). As the Board stated in *Cedar Valley Corp.*, 302 NLRB 823 (1991): "A party may not lawfully repudiate an 8(f) agreement during its term."

Further, the Board and the courts have consistently refused to allow a party to use parole evidence of an alleged oral agreement to vary or contradict the terms of a written agreement. The sole exception to this rule is that where there are sufficient ambiguities or uncertainties in the written agreement, parole evidence will be admissible to resolve these ambiguities in order to determine the parties' intent. *Sansla, Inc.*, 323 NLRB 107, 109 (1997); *Commonwealth Communications, Inc.*, 335 NLRB 765 (2001), enf. denied 312 F.3d 465, D.C. Cir. 2002. Therefore, the initial issue herein is whether there is any ambiguity or uncertainty in the contracts regarding the scope and the unit coverage of these contracts. I find none. Both the Acceptance of Working Agreements and the collective bargaining agreements which they refer to are crystal clear. The contract specifically states that it covers all of the Respondent's employees and work within the Union's jurisdiction. In *Sansla, supra*, in addition to the employer's name, address and telephone number, the agreement that the employer executed listed the job that he was performing under: "Location of job." That created enough uncertainty to allow the employer to introduce parole evidence to determine the parties' intent regarding the scope of the agreement. There is no such uncertainty here. The terms and scope of the agreement are clearly and unambiguously set forth. Finally, I find that the fact that it took the Union three and a half years to realize that the Respondent, which was conducting its

operations openly, was performing unit work in the area, does not assist the Respondent in establishing that its agreements with the Union were one-job contracts. Rather, it simply establishes that the Union's enforcement efforts were lax. I therefore find that by refusing to recognize its obligations under this agreement, the Respondent violated Section 8(a)(1)(5) of the Act.

### **Conclusions of Law**

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to adhere to, and by repudiating, the collective bargaining agreement it agreed to be bound by on May 21, 2004, the Respondent violated Section 8(a)(1)(5) of the Act.

### **The Remedy**

Having found that the Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I recommend that the Respondent be ordered to implement and adhere to the terms of the collective bargaining agreement effective for the period April 1, 2004 through March 31, 2009, and to make whole the unit employees for any loss of wages or other benefits that they sustained as a result of the Respondent's repudiation of its responsibilities and obligations under this contract and the earlier one. I also recommend that Respondent be ordered to pay to the appropriate Union funds all health, welfare, pension and other fringe benefits, as provided for in these contracts.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### **ORDER**

The Respondent, Sheehy Enterprises, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Laborers' Union of North America, State of Indiana District Council, a/w Laborers' International Union of North America, by refusing to adhere to, and by repudiating, a collective bargaining agreement that it entered into with the Union, said agreement being effective for the period April 1, 2004 through March 31, 2009.

---

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Give effect to the terms of the collective bargaining agreement effective for the period April 1, 2004 through March 31, 2009 that it agreed to be bound by on May 21, 2004.

(b) Make whole its employees for any wages or other benefits that they may have lost due to the Respondent's failure to abide by the terms of this, and the prior contract and make whole the Union funds for fringe benefits that were supposed to be, but were not, paid by the Respondent pursuant to these agreements.

(c) Upon request, allow the Union, or its funds, to audit its books and records to determine the amount owed to employees and the funds.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Indianapolis, and at all of its jobsites, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**Dated, Washington, D.C., September 3, 2008.**

---

**Joel P. Biblowitz**  
**Administrative Law Judge**

---

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

**WE WILL NOT** fail or refuse to give effect to, or fully comply with, the terms and conditions of employment set forth in the contract we entered into with Laborers' International Union of North America, State of Indiana District Council ("the Union") that was effective for the period April 1, 2004 through March 31, 2009 and **WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** give effect to the terms of the contract that we entered into with the Union on May 21, 2004, which agreement is effective from April 1, 2004 through March 31, 2009, **WE WILL** make you whole for any loss that you suffered, plus interest, due to our failure to apply the terms of our contracts with the Union and **WE WILL** make the Union funds whole for our failure to pay the appropriate amount due to the funds pursuant to the contract.

**WE WILL**, upon request, allow the Union or its funds to audit our books and records to determine the amount we owe to the employees or the funds.

**SHEEHY ENTERPRIZES, INC.**  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

575 North Pennsylvania Street, Federal Building, Room 238  
Indianapolis, Indiana 46204-1577  
Hours: 8:30 a.m. to 5 p.m.  
317-226-7382.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACTED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACTED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE COMPLIANCE OFFICER, 317-226-7413.