Operative Plasterers' & Cement Masons' International Association Local 200, AFL–CIO and Operative Plasterers' & Cement Masons' International Association, AFL–CIO *and* Standard Drywall, Inc. Case 21–CD–673

December 31, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The General Counsel of the National Labor Relations Board issued a complaint on July 31, 2009, alleging that the Respondents, Operative Plasterers' & Cement Masons' International Association, Local 200, AFL–CIO (Local 200) and Operative Plasterers' & Cement Masons' International Association, AFL–CIO (the International), acting as Local 200's agent, violated Section 8(b)(4)(ii)(D) of the Act. The Respondents each filed an answer admitting in part and denying in part the allegations in the complaint, and raising affirmative defenses.

On September 24, 2009, the Charging Party, Standard Drywall, Inc. (SDI) filed a Motion for Summary Judgment and a Motion to Strike Affirmative Defenses. On September 25, 2009, the Respondents filed an opposing Motion for Summary Judgment. The General Counsel filed an opposition to the Respondents' motion and a statement in support of SDI's motion. The Respondents filed an opposition to SDI's motion and SDI filed an opposition to the Respondents' motion.

On November 17, 2009, the Board issued an order transferring this proceeding to the Board and a Notice to Show Cause why the Respondents' and SDI's motions should not be granted. The General Counsel and SDI filed responses.[1]

Ruling on Motions for Summary Judgment

The issue presented in this case is whether the Respondents, Local 200 and the International, violated Section 8(b)(4)(ii)(D) of the Act by pursuing legal actions against SDI with an object of forcing and requiring SDI to assign certain plastering work to Local 200-represented employees.

SDI and the General Counsel contend that no material facts are in dispute and that, under well-established Board law, the Respondents violated the Act by pursuing and maintaining legal actions contrary to the Board's award of plastering work in an earlier 10(k) proceeding. See *Carpenters (Standard Drywall),* 348 NLRB 1250 (2006) (*SDI-II)* (2006) (Board awarded work in dispute to SDI's employees represented by Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Carpenters), rather than employees represented by Local 200); see also *Southwest Regional Council of Carpenters (Standard Drywall, Inc.),* 346 NLRB 478 (2006) (*SDI-I)* (same).[2] SDI and the General Counsel further contend that the Respondents' defenses should be rejected, as they constitute attempts to relitigate threshold issues that the Board decided in *SDI-I* and *SDI-II*.

The Respondents agree that there are no facts in dispute but they contend that their pursuit of legal actions to obtain work contrary to the Board's 10(k) award in *SDI-II* did not violate the Act. The Respondents argue that the Board lacked jurisdiction under Section 10(k) to issue the award in that case because, contrary to the Board's findings in *SDI-II*, all parties are bound to a voluntary method of resolving the underlying jurisdictional dispute. The Respondents further argue that this case presents a work-preservation dispute and not a jurisdictional dispute as contemplated by Section 10(k), and that the Board improperly refused to allow the Respondents to present evidence of collusion in *SDI-II*, supra. In support of their contentions, the Respondents seek to introduce evidence, including declarations and documents, that they claim show that SDI and Carpenters colluded to ensure that the disputed work would be awarded to Carpenters-represented employees in *SDI-II*. Thus, the Respondents contend that they did not violate the Act as a matter of law, and summary judgment should be granted in their favor.

In their responses to the Notice to Show Cause, the General Counsel and SDI reiterate that the Respondents' motion should be denied because it raises threshold issues previously decided that may not be relitigated in this proceeding. The General Counsel and SDI further contend that the Respondents' motion improperly attempts to introduce unauthenticated evidence that has not been subject to cross-examination and that was previously rejected by the Board in *SDI-III* and in the 10(k) proceedings.

[1] We deny the Respondents' motion to consolidate this proceeding with *Plasterers Local 200, (Standard Drywall, Inc.)*, 357 NLRB No. 160 (2011) (*SDI-III*). We also deny the Respondents' request for oral argument as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] SDI further asserts that the Board should take official notice of the record in *SDI-III*, as well as defer to the court's factual findings in *Standard Drywall Industries* v. *Plasterers Local*, 633 F.Supp.2d 1114 (C.D.Cal. 2009).

Based on the factual findings in *SDI-I*, *SDI-II*, and *SDI-III*, the Respondents' admissions in their answers to the complaint, and their acknowledgment that this case presents nearly identical facts and overlapping legal issues with *SDI-III*, we find that there are no material issues of fact warranting a hearing and that, as a matter of law, the Respondents have violated Section 8(b)(4)(ii)(D) as alleged.

Accordingly, we grant SDI's Motion for Summary Judgment and deny the Respondents' Motion for Summary Judgment.

On the entire record the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, SDI, a California corporation, with a principal place of business in Riverside, California, and offices located in Arizona, Wyoming, and Utah, has been engaged as a contractor and/or subcontractor in the drywall construction industry. During the 12-month period ending December 31, 2008, a representative period, SDI, in conducting its business operations, derived gross revenues in excess of $500,000, and purchased and received at its California projects goods and materials valued in excess of $50,000 directly from points outside the State of California. We find that SDI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a person engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(ii) of the Act. We also find that the Respondents International and Local 200, as well as Carpenters, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts[3]

SDI is a contractor in the drywall construction industry in southern California. As stated above, in two prior 10(k) proceedings—*SDI-I* and *SDI-II*—the Board awarded SDI's disputed plastering work to employees represented by Carpenters rather than to employees represented by Local 200. In *SDI-III,* the Board found that the Respondents violated Section 8(b)(4)(ii)(D) by filing and maintaining grievances, arbitration claims, and state lawsuits that sought to obtain work assignments contrary to the Board's 10(k) award in *SDI-II*.

The relevant background to this fourth SDI proceeding can be briefly stated. In 2002, SDI and Carpenters entered into an agreement covering plastering work in 12 southern California counties. In October 2004, Local 200 filed suit in California state court (the Pullen suit) alleging that SDI violated California state law by failing to employ plastering apprentices on public works projects and failing to pay prevailing wages at public worksites in southern California.[4] In May 2005, Local 200 offered to withdraw the suit if SDI executed an agreement assigning its plastering work on a public works project in Fullerton, California to Local 200-represented employees. Carpenters, whose members were performing the Fullerton work, threatened to strike SDI if it reassigned the disputed work. SDI filed charges alleging that Carpenters' threat violated Section 8(b)(4)(ii)(D).

In *SDI-I,* a 10(k) proceeding, the Board issued a Decision and Determination of Dispute awarding the disputed Fullerton work to employees represented by Carpenters.

Within days of the Board's Decision in *SDI-I,* SDI filed new charges alleging that Carpenters had used proscribed means to enforce its claim to SDI's plastering work in 12 southern California counties. In *SDI-II,* another 10(k) proceeding, the Board again awarded the contested work to employees represented by Carpenters, relying on established criteria and expressly rejecting Local 200's claim of collusion between Carpenters and SDI. *SDI-II*, 348 NLRB at 1252, 1254. The Board also rejected Local 200's contention that all parties were bound to a voluntary dispute resolution mechanism, the AFL–CIO's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan).

Because of the likelihood of future jurisdictional disputes, *SDI-II* included a broad work award: "the determination of this dispute applies not only to the jobs in which the dispute arose but to all similar work done by [SDI] on any other public works projects in the 12 southern California counties, where the jurisdiction of the two unions overlap." *SDI-II*, 348 NLRB at 1256.

Following *SDI-II*, the Respondents continued pursuing lawsuits and grievances (the latter under the Plan) against SDI related to its plastering work. These actions included the Pullen lawsuit, still pending in state court; another state lawsuit alleging that SDI and Carpenters tortiously interfered with Local 200's prospective economic advantage by participating in a kickback scheme that resulted in SDI's assignment of plastering work to

[3] The recited facts are based on the Board's findings in *SDI–I, II, and III*.

[4] *Pullen v. Standard Drywall, Inc.*, Case RC 428011. At that time Local 200 operated the only State-approved apprentice program. Local 200 sought backpay for SDI's failure to employ its apprentices on public works projects and an injunction against future violations.

employees represented by Carpenters rather than by Local 200; the International's pursuit of a grievance to arbitration under the Plan seeking SDI's plastering work; and the International's request that the Plan administrator file a complaint against SDI.[5]

In *SDI-III,* the Board found that the Respondents' pursuit of these legal actions violated Section 8(b)(4)(ii)(D).[6] Relying on well-settled precedent, the Board held that the Respondents' actions to obtain the work, or monetary damages in lieu of the work, were contrary to the Board's 10(k) award, and thus had an illegal objective and violated Section 8(b)(4)(ii)(D).[7]

In *SDI-III*, applying settled precedent, the Board first rejected the Respondents' attempts to relitigate issues decided in *SDI-II*, including whether the dispute was properly before the Board, whether there was another agreed-upon method of resolution, whether there was collusion between SDI and Carpenters,[8] and the correctness of the Board's 10(k) determination. See *SDI-III,* slip op. at 3. The Board observed that threshold issues are not subject to relitigation after a 10(k) award. *Longshoremen Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1, 2 fn. 4 (1988).

B. The Instant Complaint

On July 31, 2009, the General Counsel issued a new unfair labor practice complaint alleging that the Respondents violated Section 8(b)(4)(ii)(D) by pursuing another arbitration award involving different jobsites but still contrary to *SDI-II*'s broad 10(k) award. The complaint alleges that the International, acting as Local 200's agent, pursued to arbitration a grievance seeking plastering work performed by SDI's employees. Specifically, the complaint alleges, and the Respondents admit, that about January 5, 2009, the International pursued a grievance seeking plastering work being performed by SDI's employees at Valley Regional Elementary Schools Nos. 7 and 9, both located in southern California. Arbitrator Greenberg awarded the plastering work at the two schools to employees represented by Local 200. Additionally, the complaint alleges, and the Respondents admit, that in response to SDI's request to vacate the arbitration award, the International filed a counterclaim in the United States District Court for the Central District of California to enforce and confirm the Greenberg award.[9]

The Respondents' answer denies that the Board's earlier awards were in compliance with 10(k) and raises affirmative defenses.[10]

C. Discussion

It is undisputed that, despite a contrary 10(k) award, the Respondents filed a grievance resulting in Arbitrator Greenberg's award of SDI plastering work to employees represented by Local 200, as well as a subsequent claim in federal court to enforce and confirm that award.[11] As noted above, the Board found in *SDI-III* that the Respondents' pursuit of grievances and lawsuits to obtain such work had an illegal objective and violated Section 8(b)(4)(ii)(D). See slip op. at 3; see also *E. P. Donnelly*, supra, slip op. at 3. In *SDI-III*, the Board also found that the Respondents could not relitigate threshold matters already decided in an underlying 10(k) proceeding. See slip op. at [12] fn. 12.

Here, as they concede in their motion to consolidate, the Respondents engaged in conduct that is virtually identical to that found to be unlawful in *SDI-III*. Further, the Respondents' defenses and proffered evidence have already been considered and rejected by the Board in *SDI-III*.

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[5] On September 15, 2008, the district court granted a 10(l) injunction against the Respondents, ordering them to cease and desist from unlawfully threatening, restraining, or coercing SDI in any manner or by any means. *Small v. Plasterers, Local 200*, 2008 WL 4447684 (C.D.Cal. 2008). The Ninth Circuit denied the Respondents' challenge to the scope of the court's Order *Small v. Operative Plasterers' and Cement Masons' International Assn. Local 200*, 611 F.3d 483 (9th Cir. 2010).

[6] Sec. 8(b)(4)(ii)(D) prohibits unions from using threats, coercion or restraint with an object of forcing or requiring an employer to assign certain work to employees represented by a particular labor organization rather than to employees represented by another labor organization.

[7] The Board noted that the Supreme Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), did not undermine the Court's earlier statement that legal proceedings that have an objective that is illegal may be enjoined without infringing on the First Amendment. *Bill Johnson's Restaurants, NLRB*, 461 U.S. 731, 737, fn. 5 (1983). *SDI-III*, supra, slip op. at 3, relying on *E. P. Donnelly*, 357 NLRB No. 131, slip op. at 2 fn. 4 (2011).

[8] [7]The Board specifically concluded that the issue of collusion, i.e., the Respondents' argument that collusion between the Carpenters and SDI led to SDI's assignment of work traditionally performed by Local 200-represented employees to Carpenters-represented employees, was a threshold issue in the 10(k) proceeding that could not be relitigated in the unfair labor practice proceeding. In so ruling, the Board rejected the Respondents' contention that its conduct amounted to lawful work preservation. See also *SDI-II*, supra at 1254.

[9] The court ultimately dismissed the counterclaim and vacated the Greenberg award as being contrary to the Board's 10(k) award. *Standard Drywall, Inc. v. Plasterers, Local 200,* 633 F.Supp.2d 1114 (C.D.Cal. 2009).

[10] Among other things the Respondents raise a 10(b) defense. However, we reject this defense as the Respondents have not presented any evidence or argument in support.

[11] In its answer to the complaint, the International admits that it acted as Local 200's agent when it pursued the grievance and filed the counterclaim in district court. Local 200 denies that the International acted as its agent. We find, consistent with our conclusion in *SDI-III*, slip op. at 3, that the International acted as Local 200's agent as alleged.

Accordingly, consistent with our decision in *SDI-III* as well as our recent decision in *E. P. Donnelly*, we grant SDI's motion and find that the Respondents violated Section 8(b)(4)(ii)(D) as alleged.[12]

CONCLUSION OF LAW

By pursuing to arbitration a grievance seeking plastering work performed by employees of SDI that had been awarded by the Board to employees represented by Carpenters; and by filing a counterclaim in the United States District Court for the Central District of California to enforce the Greenberg award resulting from that grievance, the Respondents violated Section 8(b)(4)(ii)(D) of the Act. The Respondents are jointly and severally liable for the unfair labor practices found in this proceeding.

REMEDY

Having found that the Respondents have violated Section 8(b)(4)(ii)(D) of the Act, we shall order them to cease and desist[13] and to take certain affirmative action designed to effectuate the purposes of the Act, including paying attorney fees to SDI.[14]

ORDER

The National Labor Relations Board orders that the Respondents, Operative Plasterers' & Cement Masons' International Association, its officers, agents, and representatives, and Operative Plasterers' & Cement Masons' International Association, Local 200, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Pursuing a grievance to arbitration and seeking to enforce the arbitration award in order to obtain plastering work performed by SDI employees represented by Carpenters at the Valley Regional Elementary Schools Nos. 7 and 9, both located in southern California, with an object of requiring SDI to assign the disputed work to employees represented by Respondent Local 200 rather than to employees represented by Carpenters.

(b) Threatening, coercing, or restraining SDI, or any other person or employer engaged in commerce or in an industry affecting commerce, where an object of their actions is to force or require the employer to assign plastering work to Local 200's members, rather than to its own employees who are not members of Local 200, until Local 200 is certified by the Board as the bargaining representative of the employees performing such work.

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

(a) Withdraw the petition to enforce the Greenberg award.

(b) Reimburse SDI for reasonable legal expenses and fees associated with the defense against the Greenberg award and the Respondents' counterclaim in federal district court, with interest as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011).

(c) Within 14 days after service by the Region, post at their respective offices and meeting halls copies of the attached notice, in English and Spanish, marked "Appendix."[15] Copies of the Notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its members by such means.[16] Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, deliver to the Regional Director for Region 21 signed copies of the notice in sufficient number for posting by SDI at its jobsite, if it wishes, in all places where notices to employees are customarily posted.

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[12] In light of our decision, we deny the Respondents' Motion for Summary Judgment. We also deny SDI's Motion to Strike.

[13] We find that a broad cease-and-desist order against the Respondents is warranted based on their repeated violations of Sec. 8(b)(4)(ii)(D) in this case and in *SDI-III*. See generally *Five Star Mfg.*, 348 NLRB 1301 (2006); *Hickmott Foods*, 242 NLRB 1357 (1979) (proclivity to violate the Act justifies a broad order).

[14] See *SDI-III*, slip op. at 10, citing *Teamsters Local 776 (Rite Aid),* 305 NLRB 832 fn. 10 at 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993); see also *Food & Commercial Workers Local 367 (Quality Foods)*, 333 NLRB 771 (2001); *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 403 (1993), enfd. in relevant part 68 F.3d 490 (D.C. Cir. 1995).

[15] 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."

[16] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

(e) 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. December 31, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS AND 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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT pursue a grievance to arbitration and seek to enforce the arbitration award in order to obtain plastering work performed by Standard Drywall, Inc. employees represented by Carpenters at the Valley Regional Elementary Schools Nos. 7 and 9, both located in southern California, with an object of requiring Standard Drywall, Inc. to assign the disputed work to employees represented by Respondent Local 200 rather than to employees represented by Carpenters.

WE WILL NOT threaten, coerce, or restrain Standard Drywall, Inc., or any other person or employer engaged in commerce or in an industry affecting commerce, where an object of our actions is to force or require the employer to assign plastering work to Local 200's members, rather than to its own employees who are not members of Local 200, until Local 200 is certified by the Board as the bargaining representative of the employees performing such work.

WE WILL withdraw our petition to enforce the Greenberg award.

WE WILL reimburse SDI for reasonable legal expenses and fees with interest incurred in defending against the Greenberg award after December 13, 2006.

OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL–CIO