

Nos. 12-70047, 12-70139, 12-70379

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANDARD DRYWALL, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

OPERATIVE PLASTERERS & CEMENT MASONS INT'L and LOCAL 200
Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

STANDARD DRYWALL, INC.
Intervenor

and

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS
Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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GLOSSARY

“The Act”	The National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)
“The Board”	The National Labor Relations Board (Respondent in 12-70047; Respondent/Cross-Petitioner in 12-70139 NS 12-70379)
“The Carpenters”	The Southwest Regional Council of Carpenters (Intervenor in 12-70139 and 12-70379)
“The Company”	Standard Drywall, Inc. (Petitioner in 12-70047; Intervenor in 12-70139 and 12-70379)
“The International”	The Operative Plasterers & Cement Masons’ International Association of the United States & Canada, AFL-CIO (Petitioner/Cross-Respondent in 12-70139 and 12-70379)
“Local 200”	The Operative Plasterers & Cement Masons’ International Association of the United States & Canada, AFL-CIO, Local 200 (Petitioner/Cross-Respondent in 12-70139 and 12-70379)
“The Plasterers”	The International and Local 200, collectively
“The Plan”	The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Putative Amicus Curiae)
“The PSA”	Project Service Agreement

- “SDI I”* 346 NLRB 478 (2006) (Board Section 10(k) Decision and Determination of Dispute)
- “SDI II”* 348 NLRB 1250 (2006) (Second Board Section 10(k) Decision and Determination of Dispute)
- “SDI III”* 357 NLRB No. 160 (2011) (The Board Order on review in the instant case)
- “SDI IV”* 357 NLRB No. 179 (2011) (The related Board Order pending review and enforcement before this Court in 12-70151 and 12-70384)

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**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on two petitions for review, and the National Labor Relations Board's cross-application for enforcement, of the same Board Decision and Order, which issued on December 30, 2011, and is reported at 357 NLRB No. 160. (ER 28-42.)¹ The Operative Plasterers' & Cement Masons' International Association of the United States & Canada, AFL-CIO ("the International") and the Operative Plasterers' & Cement Masons' International Association of the United States & Canada, AFL-CIO, Local 200 ("Local 200") (collectively, "the Plasterers") have filed one of the petitions for review, and the Board has cross-applied for enforcement of its Order against the Plasterers. Standard Drywall, Inc. ("the Company"), and Southwest Regional Council of Carpenters ("the Carpenters") have intervened on the side of the Board. In addition, the Company has filed a petition for review of the same Board Order.² The petitions and the cross-application are timely because the Act imposes no time limitation for such filings.

¹ "ER" refers to the Excerpts of Record filed by the Plasterers with their opening brief. "SDI ER" refers to the Company's Excerpts of Record filed with its opening brief. "SER" refers to the Board's Supplemental Excerpts of Record filed with this Brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² Before the Board, the International and Local 200 were Respondents, the Company was the Charging Party, and the Carpenters were a party-in-interest.

The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)), because the Order is final and the unfair labor practices took place in California.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board reasonably found that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing lawsuits and other legal actions that were inconsistent with the Board’s Section 10(k) work assignments awarding the work in dispute to employees represented by the Carpenters.
2. Whether the Board acted within its broad remedial discretion in awarding attorneys’ fees and costs to the Company and the Carpenters for defending against the Plasterers’ unlawful actions, and by issuing its customary cease-and-desist order against the Plasterers.
3. Whether the Company lacks standing to challenge the Board’s evidentiary ruling allowing the Section 10(k) proceedings to be included in the record because the Company ultimately prevailed despite its disagreement with the evidentiary ruling.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Company, the General Counsel filed a complaint alleging that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by filing and pursuing lawsuits and other legal actions against the Company and the Carpenters that were inconsistent with previous Board Decisions and Determinations under Section 10(k) of the Act (29 U.S.C. § 160(k)). (SER 27, 28-38.)

In September 2007, a Board administrative law judge conducted a hearing on the complaint allegations. On February 11, 2008, he issued a decision and recommended order finding the violations alleged in the General Counsel's complaint. He also recommended that the Board direct the Plasterers to withdraw the lawsuits and other causes of action, and reimburse the Company for reasonable attorneys' fees and costs associated with those illegal actions.³ (ER 40-41.)

On review, the Board adopted the judge's rulings, findings, and conclusions, and modified the recommended order to include an award of attorney's fees to the

³ On August 4, 2008, the Regional Director of the Board's Los Angeles Regional Office petitioned the District Court for the Central District of California to enjoin the Plasterers' lawsuits against the Company under Section 10(l) of the Act (29 U.S.C. § 160(l)). The district court granted the injunction and, on July 8, 2010, this Court upheld it, enjoining the Plasterers from pursuing the lawsuits pending the Board's issuance of a final order. *See Small v. Operative Plasterers' & Cement Masons Local 200*, 611 F.3d 483 (9th Cir. 2010) ("*Small*").

Carpenters. (ER 28-33.) The facts supporting the Board's findings are outlined below, followed by a summary of the Board's Conclusions and Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. **The Company's Business and Its Relationship with the Carpenters; Plasterers Local 200 Officials File a Wage-and-Hour Lawsuit Against the Company in an Effort to Obtain the Company's Plastering Work**

The Company, a California corporation engaged in the construction industry, has had a collective-bargaining relationship with the Carpenters for at least 10 years. (ER 28, 34-35; SDI ER 38-48.) Pursuant to that relationship, the Company has assigned its plastering work at public works projects in 12 southern California counties to employees represented by the Carpenters. *Id.* The Company has never had a bargaining relationship with the Plasterers. (ER 43, 50; 274.)

In October 2004, Local 200 Business Manager Robert Pullen and Business Agent David Frichtel, as individuals, filed a lawsuit in California state court ("the Pullen lawsuit") alleging that the Company violated state wage-and-hour laws by underpaying plastering apprentices at southern California public works sites at a time when the Plasterers operated the only state-approved apprenticeship program for that kind of work. (ER 28, 34; 228-37.) The Pullen lawsuit sought, among other remedies, backpay for alleged underpaid employees, and an injunction requiring compliance with state law. (ER 228-37.)

B. The Unions Claim the Same Plastering Work at a Company Jobsite; the Company Files an Unfair Labor Practice Charge Against the Carpenters; Local 200 Offers To Dismiss the Pullen Lawsuit if the Company Would Sign an Agreement with the Plasterers; Local 200 Amends the Pullen Lawsuit

In December 2004, the Company began work on the Fine Arts Project located at the California State University campus in Fullerton, California (“CSF Fine Arts project”), using employees covered by its collective-bargaining agreement with the Carpenters. (ER 50.) In January 2005, Local 200 Business Agent Russ Nicholson went to the CSF Fine Arts project jobsite and told Superintendent David Corona that he would “like to have the guys come back and sign with Local 200.” *Id.* Upon learning of this demand, the Carpenters told the Company that its employees would strike if the Company gave the work to Local 200. *Id.*

In February 2005, the Company filed an unfair labor practice charge alleging that the Carpenters violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by threatening to strike the Company if it assigned plastering work to employees represented by the Plasterers.⁴ (ER 50.) Pursuant to Section 10(k) of the Act (29 U.S.C. § 160(k)), the Region held the charge in abeyance

⁴ Section 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 in a particular labor organization rather than to employees in another labor organization.

while the Board convened proceedings to determine if the two unions had a bona fide jurisdictional dispute and, if so, to whom to assign the disputed work.⁵

While the unfair labor charge was pending, both unions continued to claim the work in dispute. On April 28, 2005, the Carpenters sent a letter to the Company again threatening to strike over the disputed work at the CSF Fine Arts project. (ER. 50.) In May 2005, Plasterers representatives told company representatives that if the Company would sign an agreement giving the Plasterers the disputed work, they would try to secure dismissal of the Pullen lawsuit. (ER 50-51.)

On August 9, 2005, Pullen and Frichtel amended the complaint in the Pullen lawsuit to add Local 200 as a plaintiff, to seek backpay for all Local 200 apprentices not employed by the Company, and to seek restitution and injunctive relief against the Company for failing to make apprenticeship contributions for apprentices it did not hire on all of its past, present, and future public works projects in 12 southern California counties. (ER 34, 43, 51, 238-250.)

⁵ Section 10(k) of the Act provides that, “[w]henver it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(ii)(D)], the Board is empowered to hear and determine the dispute out of which such unfair labor practice has arisen”

C. The Board Issues a Section 10(k) Decision in *SDI I* Awarding the Company's Plastering Work at the CSF Fine Arts Project to the Carpenters-Represented Employees

On September 9, 2005, the Region held a hearing under Section 10(k) of the Act (29 U.S.C. § 160(k)) concerning the dispute between the Carpenters and the Plasterers over the work at the CSF Fine Arts project. On January 31, 2006, the Board (Chairman Battista, Members Liebman and Schaumber) issued a Section 10(k) Decision and Determination of Dispute.⁶ (ER 50-55.) First, the Board (ER 52-53) made the required threshold finding that reasonable cause existed to believe that: (1) the two unions had competing claims to the disputed work; (2) the Carpenters had used proscribed means by threatening to strike to enforce its claim to the work; and (3) the parties did not have an agreed-upon method for voluntary adjustment of the dispute. The Board then considered the relevant factors and awarded the disputed plastering work at the Company's CSF Fine Arts project to

⁶ *Sw. Reg'l Council of Carpenters, United Bhd. of Carpenters and Joiners of Am. and Standard Drywall, Inc. and Operative Plasterers' and Cement Masons' Int'l Ass'n, Local No. 200, AFL-CIO*, 346 NLRB 478 (2006) ("*SDI I*").

the employees represented by the Carpenters.⁷ Accordingly, the Board also dismissed the charge against the Carpenters.⁸ (ER 53-55.)

D. The Unions Claim the Same Work at Additional Company Jobsites; the Plasterers Offer To Drop the Pullen Lawsuit if the Company Signs an Agreement with the Plasterers in California; the Company Files Another Unfair Labor Practice Charge; the Plasterers Pursue Grievances Against the Company

On February 21, 2006, Plasterers representatives told the Company that they would drop the Pullen lawsuit, but only as it applied to the CSF Fine Arts project in Fullerton. (ER 43; ER 152.) On February 23, the Company informed the Carpenters that, because the Pullen lawsuit covered numerous other jobsites, the Company “may have no choice” but to assign such plastering work to employees represented by the Plasterers. (ER 43; ER 151-55.)

On February 24, Carpenters representatives wrote to the Company, stating that if the Company “attempts to reassign any work” currently being performed by its members, the Carpenters “will immediately strike” the Company. (ER 44, 46; ER 156.) Around the same time, International Secretary-Treasurer Patrick Finley told Company Vice President Blaine Caya that Finley would try to get “the

⁷ The relevant factors are: certification and collective-bargaining agreements; employer preference and past practice; area and industry practice; relative skills; and economy and efficiency of operations. (ER 53-55.)

⁸ See 29 U.S.C. § 160(k) (“[u]pon compliance by the parties to the dispute with the decision of the Board . . . such charge shall be dismissed.”)

[Pullen] lawsuit dropped” if the Company signed an agreement requiring the use of Plasterers-represented employees on the Company’s California projects. (ER 44, 46; ER 442-43.)

On March 2, 2006, the Company filed a charge alleging that the Carpenters violated Section 8(b)(4)(ii)(D) of the Act by threatening to strike the Company if it assigned its plastering work in southern California to employees represented by the Plasterers.⁹ (SER 15.) The Region held the charge in abeyance while the Board convened a second proceeding under Section 10(k) of the Act to determine if the two unions had another bona fide jurisdictional dispute and, if so, to whom to assign the additional work in dispute.

In April and May 2006, the Region conducted the second Section 10(k) hearing, which concerned a dispute over 97 public works projects in 12 southern California counties. (ER 45; SER 21-24.) At the hearing, Carpenters representative Gordon Hubel testified and repeated the Carpenters’ earlier strike threat—that the Carpenters would strike if the Company reassigned any of the plastering work being performed by Carpenters-represented employees on the Company’s southern California projects. (ER 44; SER 3-13.)

⁹ Initially, the Company also filed a charge against the Plasterers, but eventually dropped it. (SER 14, 25-26.)

On May 29, 2006, the International pursued a grievance to arbitration under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“the Plan”) before arbitrator Tony Kelly. Kelly awarded plastering work being performed by company employees at the Central Los Angeles High School # 2, the East Valley New Middle School # 1, and the Cal Trans Replacement Facilities Shop # 7 to employees represented by Plasterers Local 200 (“the Kelly award”). (ER 35; ER 253-58.)

On July 7, 2006, the International pursued another grievance under the Plan, alleging that the unfair labor practice charges that the Company had filed against the Plasterers were impeding the enforcement of the Kelly award. (ER 29; ER 259-62.) Arbitrator Paul Greenberg issued an award that ordered the Company to withdraw any unfair labor charges filed with the Board (“the Greenberg award”). (*Id.*)

E. The Board Issues a Section 10(k) Decision in *SDI II* Awarding the Company’s Plastering Work in 12 Southern California Counties to the Carpenters-Represented Employees

On December 13, 2006, the Board (Chairman Battista, Members Liebman and Schaumber) issued a second Section 10(k) Decision and Determination.¹⁰ (ER

¹⁰ *Sw. Reg’l Council of Carpenters, United Bhd. of Carpenters and Joiners of Am. and Standard Drywall, Inc. and Operative Plasterers’ and Cement Masons’ Int’l Ass’n, Local No. 200, AFL-CIO*, 348 NLRB 1250 (2006) (“*SDI II*”).

43-49.) Again, the Board made the required threshold finding that reasonable cause existed to believe that: (1) the Plasterers and the Carpenters had competing claims to the disputed work in 12 southern California counties; (2) the Carpenters used proscribed means by threatening to strike to enforce its claim to the work; and (3) the parties did not have an agreed-upon method for voluntary adjustment of the disputed work. After considering the relevant factors, the Board awarded the disputed work to the Carpenters.¹¹ (ER 47-49.) Given the likelihood of future jurisdictional disputes and the wide breadth of the Carpenters' threats to strike, the Board concluded that "the determination of this dispute applies not only to the jobs in which the dispute arose [97 specifically-identified jobsites in Southern California] but to all similar work done or to be done by [the Company] on any other public works projects in the 12 Southern California counties, where the jurisdiction of the two Unions overlap." (ER 49.) The Board then dismissed the charge against the Carpenters. *Id.*

¹¹ See n.7 above.

F. Ignoring the Board’s Section 10(k) Award in *SDI II*, the Plasterers Continue To Pursue Enforcement of the Kelly and Greenberg Awards, File a Plan Complaint, File a Tortious Interference Lawsuit Against the Company and the Carpenters, and Again Amend the Pullen Lawsuit

On January 9, 2007, the International, on behalf of Local 200, petitioned for enforcement of both the Kelly and Greenberg awards by filing claims for enforcement under the Plan. (ER 35, ER 263.) That same day, the International, on behalf of Local 200, petitioned the Plan’s Administrator to file another complaint against the Company seeking plastering work at all Los Angeles Unified School District public work projects in the 12 southern California counties. (ER 35; ER 265.)

On May 14, 2007, the Plasterers filed a second lawsuit in California state court against the Company and the Carpenters (“the Tortious Interference lawsuit”). (ER 35; ER 271-81.) The Tortious Interference lawsuit alleges that the Company and the Carpenters tortiously interfered with the Plasterers’ prospective economic advantage by participating in a “kickback” scheme, resulting in the Company assigning its plastering work in 12 southern California counties to employees represented by the Carpenters. The complaint seeks punitive damages of \$70 million, compensatory damages of \$7 million, and injunctive relief. (ER 35-36; ER 271-81.)

On June 21, 2007, about six months after the Board issued its Decision and Determination of Dispute in *SDI II*, the Plasterers amended the complaint in the Pullen lawsuit for a second time. (Er 284-97.) The second amended complaint, which is substantially similar to the first amended complaint, continues to seek the work performed by the Carpenters for the Company in the 12 southern California counties in contravention of the Board's Section 10(k) rulings in *SDI I* and *II*. (ER 38; 284-98.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes), in agreement with the administrative law judge, found that Local 200 violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing lawsuits, arbitration awards and the Plan complaint after the Board issued its December 13, 2006 Section 10(k) determination in *SDI II*. (ER 28-42.)¹² With regard to the International, the Board found that it violated the Act by pursuing the arbitration awards and Plan complaint after *SDI II*. (ER 31-32.) The Board found that all of the Plasterers' actions had an unlawful object of improperly coercing the Company to assign work, or pay in-lieu-of work, to Plasterers-represented employees, despite the Board's contrary award of the work to Carpenters-represented employees in *SDI II*. (ER 28-42.)

¹² 357 NLRB No. 160 (2011) ("*SDI III*").

The Board's Order requires Local 200 to withdraw the petition to enforce the Kelly and Greenberg awards, the request for a Plan complaint, and the Pullen and Tortious Interference lawsuits. (ER 31.) In addition, the Board ordered Local 200 to reimburse the Company for reasonable legal expenses and fees, plus interest, associated with the defense of the Kelly and Greenberg awards, the Plan complaint, and the Pullen and Tortious Interference lawsuits, after *SDI II* issued on December 13, 2006. The Board also ordered Local 200 to reimburse the Carpenters for their reasonable legal expenses and fees, plus interest, associated with the defense of the Tortious Interference lawsuit, after December 13, 2006. (ER 32.)

As for the International, the Board's Order affirmatively requires it to withdraw its petition to enforce the Kelly and Greenberg awards and the request for a Plan complaint. The Order also directs the International to reimburse the Company for reasonable legal expenses and fees, plus interest, associated with the defense of the Kelly and Greenberg awards and the Plan complaint after December 13, 2006. (ER 31.)

Finally, the Board's Order requires the Plasterers to cease and desist from engaging in the unfair labor practices found, and to physically post and electronically distribute a notice. (ER 31-32.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by maintaining and pursuing lawsuits, grievance arbitrations, and an administrative complaint against the Company in an effort to obtain plastering work that the Board had awarded under Section 10(k) of the Act to Carpenters-represented employees. Under well-settled law, a union's actions in contravention of such awards have an illegal objective and therefore may be enjoined under the Act without running afoul of the First Amendment.

The Plasterers devote most of their brief to attacking the Section 10(k) proceedings in *SDI II*, without contesting the Board's decision to award the disputed work to the Carpenters-represented employees. Instead, the Plasterers attempt to impugn the Board's threshold jurisdictional findings: that there were competing claims to the work; that the Carpenters used strike threats to enforce their claim; and that there was no agreed-upon method for the voluntary adjustment of the dispute. However, the Plasterers utterly fail to demonstrate, as they must, that the Board's threshold findings were arbitrary and capricious. The Plasterers also challenge the broad nature of the Board's 10(k) award in *SDI II*. However, their repeated attempts to seek work assigned to the Carpenters fully warranted a broad award.

The Plasterers also fail in their fleeting challenge to the Board's remedial order in this case, which directs them to reimburse the Company and the Carpenters for reasonable fees and costs incurred in defending against the Plasterers' unlawful actions. Given that recompense for such fees and costs restores the status quo ante, the Plasterers fail to demonstrate that the Board abused its discretion in awarding such relief.

For its part, the Company makes a cursory challenge to the Board's remedial order in this case, asserting that the Board should have issued a broad cease-and-desist order. The Company—which has since received an even broader order than it seeks here—has failed to establish that the Board abused its discretion in issuing its customary cease-and-desist order in this case.

Finally, the Company asserts that the Board erred in admitting the record in the Section 10(k) proceedings into the record in this case. The Company, however, lacks standing to challenge the Board's evidentiary ruling. After all, the Company prevailed on the unfair labor practice complaint allegations despite its disagreement with the ruling. Accordingly, under Section 10(f) of the Act, the Company is not a party aggrieved by the ruling.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE PLASTERERS VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT BY FILING AND PURSUING LAWSUITS AND OTHER LEGAL ACTIONS INCONSISTENT WITH THE BOARD'S SECTION 10(k) AWARDS OF WORK TO EMPLOYEES REPRESENTED BY THE CARPENTERS

Introduction

This case involves numerous legal actions taken by the Plasterers to obtain work or pay in-lieu-of work that the Board previously awarded to the Carpenters in two Section 10(k) proceedings. As shown below, the Board, applying well-settled law, reasonably found that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by maintaining and pursuing those actions with an unlawful objective of undermining the Board's Section 10(k) awards.

On review, the Plasterers touch only briefly on the Section 8(b)(4)(ii)(D) violations found by the Board. Relying on a misreading of well-settled law, they incorrectly claim that their acts are privileged by the First Amendment. And, contrary to very pleadings that the Plasterers filed in their lawsuits, they weakly assert that those lawsuits do not contravene the Board's Section 10(k) awards. Their similar assertion regarding their pursuit of the grievances and Plan complaint—which unabashedly seek work awarded to the Carpenters—is equally implausible.

The remainder of the Plasterers' argument focuses on the Board's Section 10(k) determinations. The Plasterers do not challenge the Board's decision to award the disputed work to the Carpenters-represented employees. Instead, regarding *SDI II*, the Plasterers argue that the Board never should have made the award and that it was overly broad. Contrary to the Plasterers' claims, the Board reasonably found that the jurisdictional threshold for the Section 10(k) award was met: the parties had competing claims to the work; the Carpenters made a genuine threat to strike in support of their claim; and the Plasterers did not produce satisfactory evidence that the parties had agreed to a voluntary method for resolving the dispute. We also show, contrary to the Plasterers' claim, that the Board appropriately exercised its discretion in issuing a broad Section 10(k) award in *SDI II*.

**A. A Union Violates Section 8(b)(4)(ii)(D) by Pursuing
Lawsuits and Other Legal Actions in
Contravention of a Section 10(k) Award**

Sections 8(b)(4)(ii)(D) and 10(k) of the Act, taken together, establish the statutory scheme for resolving jurisdictional disputes, and protect interstate commerce by relieving employers trapped between the claims of rival unions from costly disruptions of their businesses occasioned by such disputes. *NLRB v. Radio & Television Broadcast Eng'rs*, 364 U.S. 573, 574-75, 579-82 (1961). Indeed, "Congress intended to make the Section 10(k) proceeding the 'peaceful and

binding’ final determination of a disputed work assignment.” *Local 32, Int’l Longshoremen v. NLRB*, 773 F.2d 1012, 1020-21 (9th Cir. 1985) (“*Local 32*”), quoting *Radio & Television Broadcast Eng’rs*, 364 U.S. at 580.

While parties may initially use other forums, such as arbitration or the courts, to resolve a work dispute, the Board’s determination of that dispute takes precedence over, and precludes enforcement of, a contrary decision. *See, e.g., Carey v. Westinghouse*, 375 U.S. 261, 272 (1964) (Board’s ruling takes precedence over arbitration award). Accordingly, it is well-settled in this Court that a lawsuit, or pursuit of other legal claims, to obtain work awarded by the Board under Section 10(k) of the Act to employees represented by another union, or monetary damages in lieu of the work, has an illegal objective and violates Section 8(b)(4)(ii)(D) of the Act. *Small*, 611 F.3d at 492 (upholding injunction in earlier proceedings in the instant case); *see also Local 32*, 773 F.2d at 1020; *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274, 283-85 (1992), *enforced mem.*, 46 F.3d 1143 (9th Cir. 1995). Other circuits have reached the same conclusion regarding lawsuits that contravene a Section 10(k) award. *See, e.g., Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1426-1429 (3d Cir. 1993); *Int’l Longshoremen’s & Warehousemen’s Union v. NLRB*, 884 F.2d 1407, 1414 (D.C. Cir. 1989) (“*Longshoremen*”).

Moreover, although a well-founded lawsuit may not be enjoined as an unfair labor practice even if it was filed with a retaliatory motive, the Supreme Court recognizes that a lawsuit having an objective that is illegal under federal law may be enjoined without violating the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983).¹³ “Thus, where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board’s ruling, the lawsuit falls within the ‘illegal objective’ exception to *Bill Johnson’s*.” *Teamsters Local 776*, 305 NLRB 832, 835 (1991), *enforced sub nom. NLRB v. Teamsters Local 776*, 973 F.2d 230 (3d Cir. 1992).

Accordingly, a plaintiff pursuing a lawsuit “for an illegal objective . . . simply could not obtain the relief it sought regardless of the evidence it produced”

¹³ In what is now commonly referred to as simply “footnote 5,” the Court in *Bill Johnson’s* stated, in relevant part:

We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not be imposed under the Act

461 U.S. at 738 n.5 (citation omitted).

and “regardless of . . . motivation.”¹⁴ *Teamsters Local 776*, 973 F.2d at 236.

Whatever a union’s motive in pursuing legal action, and “no matter how persuasive” its case, it “cannot force an employer” to ignore a Section 10(k) award. *Otis Elevator*, 309 NLRB at 274, 283-85. In this circumstance, the litigation enjoys no First Amendment protection. *Small*, 611 F.3d at 492-93; *Local 32*, 773 F.2d at 1021; *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003). Indeed, it cannot “be successfully argued otherwise” (*Bill Johnson’s*, 461 U.S. at 737 n.5), regardless of whether the lawsuit has a reasonable basis in fact and law and a benevolent motive. *See, e.g., Roofers*, 1 F.3d at 1426, n.11; *Local 32*, 773 F.2d at 1021 (lawsuit that has an illegal objective is per se baseless); *Longshoremen*, 884 F.2d at 1414, n.12 (interpreting the Ninth Circuit’s decision in *Local 32* as rejecting any requirement that litigation with an illegal objective be declared baseless prior to being enjoined); *Otis Elevator*, 309 NLRB at 274, 283-85.

Contrary to the Plasterers’ claim (Br. 46-47), *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 535-36 (2002), does not affect the above analysis. Indeed, in *Small*, 611 F.3d at 492, this Court found that *BE&K* “left undisturbed” the *Bill Johnson’s*

¹⁴ The legal origin of the attack is irrelevant. *See, e.g., Teamsters Local 776*, 973 F.2d at 232 (lawsuit under Section 301 of the Labor Management Relations Act to enforce arbitration award had illegal objective); *Wright Electric, Inc. v. NLRB*, 200 F.3d 1162, 1164, 1167 (8th Cir. 2000) (demand for information pursuant to state court discovery rules had illegal objective).

holding that a lawsuit having an illegal objective may be enjoined without running afoul of the First Amendment. *Accord Can-Am*, 321 F.3d at 151 (“*BE&K* did not affect the footnote 5 exemption in *Bill Johnson’s*.”). Further, as this Court held in *Local 32*, 773 F.2d at 1021, lawsuits prosecuted to attack a Section 10(k) decision are enjoinable on that basis alone because they are *necessarily* without proper motivation and baseless.¹⁵ Therefore, the Plasterers err (Br. 46-47) in asserting that under *BE&K*, the Board must make separate findings that a lawsuit with an unlawful objective has an improper motivation and lacks a reasonable basis.

The Board’s determination that a union violated Section 8(b)(4)(ii)(D) of the Act is subject to limited review, and must be affirmed if the Board’s underlying factual findings are supported by substantial evidence and its legal conclusions are not arbitrary or capricious. *NLRB v. Int’l Ass’n of Ironworkers, Local 433*, 549 F.2d 634, 640 (9th Cir. 1977); *NLRB v. Plumbers Local No. 741*, 704 F.2d 1164, 1166 (9th Cir. 1983). Thus, a reviewing court may not displace the Board’s choice between conflicting views, even if it could justifiably have made a different choice *de novo*. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

¹⁵ The Plasterers err in asserting (Br. 46, n.17) that in *Small*, this Court misconstrued *Local 32*. In addition to misreading *Small* and *Local 32*, the Plasterers also ignore the D.C. Circuit’s conclusion in *Longshoremen*, 884 F.2d at 1414 n.12, which accords with *Small*, that *Local 32* rejected any requirement that the Board must prove that a lawsuit with an illegal objective is also baseless in fact or law.

**B. The Board Reasonably Found that the Plasterers’
Lawsuits, Grievances and Plan Complaint, Which Seek
Company Plastering Work or Pay In-Lieu-Of Work, Have
an Illegal Objective Because they Undermine the Board’s
Section 10(k) Determinations Awarding that Work to the
Carpenters**

**1. The Pullen and Tortious Interference lawsuits
have an illegal objective conflicting with the
Board’s Section 10(k) award in *SDI II***

Applying the above principles, the Board reasonably found (ER 38) that “[t]he Pullen lawsuit, if successful,” would be “inimical” to the Board’s Section 10(k) determination in *SDI II* and “therefore has an illegal objective.” (ER 30, 38.) Indeed, the amended Pullen complaint, which the Plasterers continued to maintain and amend even after the Board issued *SDI I* and *SDI II* awarding the work to the Carpenters, “seeks recovery of wages that would have been paid to Local 200 members had SDI hired them.” (ER 30; ER 238-50, 284-98.) Thus, the Pullen lawsuit “has an illegal objective because it seeks damages for the loss of work the Board awarded to Carpenters-represented employees in its 10(k) decision.” *Small*, 611 F.3d 483, 493 (9th Cir. 2010). *See also Local 32*, 773 F.2d at 1015, 1020-1021; *Otis Elevator*, 309 NLRB 273, 274, 283-85 (1992).

Applying the same principles, the Board reasonably found (ER 30-31) that the Plasterers’ Tortious Interference lawsuit, which also seeks damages for work that the Board awarded to the Carpenters (ER 271-81), has an unlawful objective because it “conflicts directly with the [Board’s Section] 10(k) award” in *SDI II*.

Indeed, the Board noted (ER 38), that “[w]hile [the Plasterers] claim they are only seeking to enjoin tortious activity by [the Company], the effect is to cause [the Company] to assign work to Local 200 represented employees or pay over \$77 million in compensatory and punitive damages.” Thus, the Board reasonably concluded (ER 30-31) that the Plasterers, by maintaining lawsuits that have an illegal objective, violated Section 8(b)(4)(ii)(D) of the Act.

There is no merit to the Plasterers’ argument (Br. 48-50) that the Board did not demonstrate that their lawsuits have the requisite illegal objective. To begin, the Plasterers admit (Br. 49-50) that in the Pullen lawsuit, they seek to compel the Company to pay restitution to employees who participate in Local 200’s apprenticeship program but are not hired by the Company. The Plasterers, however, incorrectly assert (Br. 30-31, 49-50, 50 n.18), with no citation to caselaw, that seeking such payments “is not the same as seeking damages in lieu of lost work.” The Plasterers also erroneously speculate (Br. 50) that “some of the damages might go to apprentices who, while requested from Local 200 program, would have been represented by [the Carpenters] had they been employed by [the Company].”

As a threshold matter, these claims are based on the flawed factual premise that some apprentices requested from Local 200 would have been represented by the Carpenters if they had been employed by the Company.

This premise conflicts with the Pullen lawsuit itself, which alleges that the Company is legally obligated to use Local 200-represented apprentices to perform plastering work on those projects (ER 247), and Pullen's testimony that employees using Local 200's hiring hall are represented by Local 200. (SER 1-2.) As for the Plasterers' speculation that damages might also be paid to non-Local 200-represented employees, it cannot overcome the Board's reasonable finding (ER 30-31) that at heart, an objective of the Pullen lawsuit is to force the Company to pay damages to Local 200-represented employees for work that the Board awarded to the Carpenters in *SDI I* and *SDI II*.

Further, the Plasterers do not advance their assertion by observing (Br. 50 n.18) that the Company may have sought apprentices from Local 200's program at some point. Even if the Company had done so, it would not negate the fact that the *Plasterers*, via the Pullen lawsuit, intend to get work, or pay in-lieu-of work, for as many Plasterers-represented employees as they can, in contravention of the Section 10(k) rulings awarding the work to the Carpenters.

There is no more merit to the Plasterers' claim (Br. 51-53) that even if the Pullen lawsuit is inconsistent with the Board's Section 10(k) awards, the Board should have "limited its remedy to those particular counts or causes of action or remedies that are deemed to conflict with the 10(k) determination." As an initial matter, this assertion is without merit because the Board (ER 30-

31) considered the entire Pullen lawsuit—which contains intertwined counts and injunctive remedies—and concluded that it had “an object” of coercing the Company into give the work or pay in-lieu-of work to the Plasterers. This finding fully satisfies Section 8(b)(4)(ii)(D) of the Act, which requires only that a party’s course of conduct have “an object” that is unlawful. 29 U.S.C. § 158(b)(4)(ii)(D) (prohibiting threats with “an object” of forcing a work assignment). *Accord NLRB v. IBEW Local Union No. 769*, 405 F.2d 159, 161 n.1 (9th Cir. 1968) (sufficient for unfair labor practice finding under Section 8(b)(4)(ii)(B) that an object, if not the sole object, of threat was for a proscribed purpose).

Moreover, the Plasterers’ claim (Br. 52-53) that they should be able to go forward with portions of the Pullen lawsuit that purportedly seek damages for company employees not represented by Local 200 rings hollow. Indeed, the Plasterers, who twice offered to drop the Pullen lawsuit if the Company would give them the work, treated the lawsuit as a package deal, and never offered to drop only certain counts. In addition, the Plasterers hardly can claim that they want to vindicate the interests of employees represented by a rival union whose work assignments they continue to pursue in multiple forums.

To support their claim (Br. 51) that they should be able to proceed with portions of the Pullen lawsuit, the Plasterers erroneously rely (Br. 52) on *Sea-Land*

Serv., Inc. v. ILWU, Local 13, 939 F.2d 866 (9th Cir. 1991), and *Assoc. Gen. Contractors v. Int’l Union of Operating Eng’rs, Local 701*, 529 F.2d 1395, 1397 (9th Cir. 1976). *Sea-Land* involved the preservation of a portion of an arbitration award that did not conflict with a Section 10(k) ruling—not a wage-and-hour lawsuit like the Pullen lawsuit. *Sea-Land*, 939 F.2d at 873. And, as the Board noted (ER 31 n.14) here, *Assoc. Gen. Contractors* is distinguishable because there the union that lost the Section 10(k) award had an agreement with the employer containing an enforceable no-subcontracting provision. By contrast, as the Board found (ER 31, 31 n.14), the Company “is not signatory to a collective-bargaining agreement with Local 200 and, accordingly, cannot be found to have violated any provisions of a Local 200 contract.”

The Plasterers’ attempt to save the Tortious Interference lawsuit is equally unavailing. Unable to claim that the lawsuit does not conflict, at least in part, with the Board’s Section 10(k) awards, the Plasterers make a half-hearted claim (Br. 53) that the lawsuit “also seeks disgorgement of the money received by [the Company] from [the Carpenters].” However, seeking disgorgement of money that the Plasterers claim caused them to lose work is part-and-parcel of a lawsuit whose object is inarguably to obtain plastering work or pay in-lieu-of work for the Plasterers.

In sum, the Board appropriately exercised its discretion in this case by directing the Plasterers to withdraw the Pullen and Tortious Interference lawsuits in their entirety.

2. The Greenberg and Kelly grievances and the Plan complaint have an illegal objective that conflicts with the Board's Section 10(k) award in *SDI II*

The Plasterers do not dispute (Br. 54-56) that the Kelly and Greenberg awards run counter to the Board's award of work in the Section 10(k) proceeding in *SDI II*, as the former awards work to Local 200 and the latter enjoins the Company's maintenance of unfair labor practice charges against the Plasterers. (ER 253-62.) Nor do the Plasterers dispute that the Plan complaint also seeks the same work that the Board previously awarded to Carpenters-represented employees.

Instead, the Plasterers only assert (Br. 54-56), as they do with respect to all of their legal actions, that the Plan provided an agreed-upon method for determining the dispute at three of the 97 jobsites at issue in those proceedings, and thus that the Board should not have issued a Section 10(k) award of work in the first place. This assertion, which essentially challenges the Board's jurisdictional finding in the Section 10(k) proceeding in *SDI II*, is fully addressed below at pp. 30-42. Accordingly, the Board reasonably found (D&O 4) that the Plasterers' conduct with regard to the Kelly and Greenberg awards,

and their pursuit of the Plan complaint after the Board's Section 10(k) award in *SDI II*, violates Section 8(b)(4)(ii)(D) of the Act.

C. The Board Reasonably Found that a Jurisdictional Dispute Existed Warranting Determination of an Award Under Section 10(k) Of the Act, and Appropriately Exercised Its Discretion in Issuing a Broad Section 10(k) Award in *SDI II*

The Plasterers devote the remainder of their brief (Br. 27-45) to challenging certain aspects of the Section 10(k) proceeding in *SDI II*. On this basis, the Plasterers seek to escape liability under Section 8(b)(4)(ii)(D) of the Act for their actions in contravention of *SDI II*. As shown below, the Plasterers—who do not challenge the merits of the Board's decision to award the disputed work to the Carpenters—utterly fail to impugn the Board's reasonably-based threshold finding in *SDI II* that a jurisdictional dispute existed between the two unions. The Plasterers also fail to establish that the Board abused its discretion in issuing a broad Section 10(k) award in *SDI II*.

1. Applicable principles and standard of review

Congress enacted Section 10(k) of the Act to resolve jurisdictional disputes between competing unions, and thereby protect employers and the public from the detrimental economic impact of such disruptions to commerce. *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 123-124 (1971). Before the Board may make a work award under this Section, it must make certain threshold findings to determine that the dispute is a jurisdictional one.

Specifically, the Board must find reasonable cause to believe that (1) there are competing claims for the disputed work; (2) a party (the Carpenters) used proscribed means (a strike threat) to enforce its claim to the work; and (3) the parties have no agreed-upon method for the voluntary adjustment of the dispute. *See Elec. Workers Local 3 (Slattery Skanska)*, 342 NLRB 173, 174 (2004) (competing claims and proscribed means); *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001) (no agreed-upon method for voluntary adjustment of the dispute).

The scope of judicial review of a Section 10(k) award is narrowly limited. *NLRB v. Local 825, Operating Eng'rs*, 326 F.2d 213, 218 (3d Cir. 1964). This is so because the Board, in making its award, is “called upon to apply its experience and special expertise in considering all relevant factors, unfettered by rigid standards.” *NLRB v. ILWU*, 413 F.2d 30, 33 (9th Cir. 1969). In reviewing a Section 10(k) award in the context of a Board decision and order finding a violation of Section 8(b)(4)(ii)(D) of the Act, the court must sustain the Section 10(k) award so long as substantial evidence supports the Board’s findings of fact and the Board has not acted arbitrarily or capriciously in making the award. *See NLRB v. Plumbers Local 741*, 704 F.2d

1164, 1166 (9th Cir. 1983); *Local 32*, 773 F.2d at 1015; *Int'l Longshoreman's & Warehousemen's Union, Local 62-B*, 781 F.2d 919, 923 (9th Cir. 1986).¹⁶

2. The Board reasonably found competing claims for the disputed work

The Board reasonably found (ER 46) in *SDI II* that both the Carpenters and Plasterers laid claim to the Company's plastering work at 97 jobsites in southern California. (SER 21-24.) With regard to the Carpenters, the undisputed fact that their employees were performing the work establishes their claim to the work. *See ILWU, Local 14 (Sierra Pac. Indust.)*, 314 NLRB 834, 836 (1994). The Carpenters' February 24, 2006 letter and other statements that they would strike if the work was reassigned to the Plasterers further demonstrate the Carpenters' claim.

In finding that the Plasterers also claimed the work in dispute, the Board noted, to begin, (ER 46) that the Pullen lawsuit itself constituted a claim for the work in dispute. Indeed, the Pullen lawsuit asked for relief at all "California public works construction projects." (ER 228, 238, 284.) And, as the Board found (ER 46), the Pullen lawsuit claimed "that the [Company] is legally obligated to use

¹⁶ Since the Act does not provide for independent judicial review of a Section 10(k) award, the only stage at which the losing party in that proceeding can challenge the award is in conjunction with judicial review of the Board's subsequent Section 8(b)(4)(ii)(D) unfair labor practice finding. *NLRB v. ILWU*, 378 F.2d 33, 35-36 (9th Cir. 1967).

apprentices trained by a state-approved apprenticeship program, which requirement is only satisfied by the Plasterers' program." Further, the Board found (ER 46) that, "as a remedy, the lawsuit seeks an injunction requiring [the Company] to use apprentices from the Plasterers' apprenticeship program and compensatory damages for those apprentices' loss of work."

The testimony of Company Vice President Caya also supports the Board's finding (ER 46) that the Plasterers claimed the work. As the Board found, in February 2006, Plasterers Secretary-Treasurer Finley told Caya that Finley would try to get "the [Pullen] lawsuit dropped" if the Company signed an agreement requiring the use of Plasterers-represented employees on the Company's California projects. (ER 44, 46; Er 442-43.) The Plasterers err in attacking (Br. 31-35) the Board's reliance on Caya's testimony as evidence that the Plasterers were claiming the work in California. Thus, the Plasterers incorrectly parse Caya's testimony to claim that Finley merely told Caya that he would drop the Pullen lawsuit if the Carpenters signed an agreement in *Las Vegas*. (Er 442-43.) The Plasterers acknowledge (Br. 32) that in response, Caya noted: "but we [the Company] have all these problems in California." (ER 442-43.) However, the Plasterers overlook Caya's further testimony that Finley then replied by saying, "we really want you to sign in California." (ER 443, 564.)

The Plasterers also do not win the day by observing (Br. 32) that Finley denied offering to drop the Pullen lawsuit. (ER 569.) At the Section 10(k) stage, when the Board was considering the testimony, it was only required to find that “reasonable cause existed to believe” that there were competing claims to the work. Given the Pullen lawsuit and Caya’s testimony, it cannot be said that the Board arbitrarily decided that there were competing claims to the work in dispute.¹⁷

The Plasterers also challenge the Board’s finding by making a hyperbolic assertion (Br. 28-29) that the Board’s reliance on the Pullen lawsuit to establish a competing claim “defies reason.” The Plasterers’ assertion is based on the faulty premise that the Board relied on the finding in its first Section 10(k) determination, *SDI I*, regarding the CSF Fine Arts Project in Fullerton to somehow bootstrap its finding about the Pullen lawsuit in its second Section 10(k) determination, *SDI II*. To the contrary, the Board unremarkably found in *SDI II* (ER 46), as it did in *SDI I* (ER 52-53, n.8), that the Pullen lawsuit sought to claim plastering work for the Plasterers that was being performed by the Carpenters. The basic thrust of the

¹⁷ The Plasterers also assert (Br. 32-33) that Finley was not an agent of Local 200 and thus could not have bound Plasterers Local 200 in his conversation with Caya. However, as the Board found (ER 46), the Pullen lawsuit itself—to which Local 200 became a plaintiff in 2005—establishes that Local 200 claimed the work in dispute.

Pullen lawsuit did not change from *SDI I* to *SDI II*, and thus its aim—to secure relief for the Plasterers for all public works projects in California—remained the same. In short, on this record, the Board reasonably found that the Plasterers were claiming the work in dispute in *SDI II* and in *SDI I*.

3. The Board reasonably found that the Carpenters used proscribed means to enforce its claim to the work

The Board reasonably found in *SDI II* that the Carpenters used proscribed means by threatening to strike the Company if it assigned the plastering work in dispute to the Plasterers. (ER 47.) *See Long Island Typographical Union No. 915 (Newsday, Inc.)*, 306 NLRB 874, 876-77 (1992) (to find proscribed means, there must be “either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group”). Indeed, it is undisputed that, as stated above at p. 9, Carpenters representatives told the Company in a letter dated February 24, 2006, that if the Company “attempts to reassign any work” currently being performed by its members, the Carpenters “will immediately strike” the Company. (ER 44, 46.) In addition, at the Section 10(k) hearing in *SDI II*, Carpenters Representative Hubel repeated that the Carpenters would strike if the Company reassigned any plastering work being performed by Carpenters-represented employees on the Company’s southern California projects. (ER 44; SER 6-16.)

Relying on sheer speculation about payments from the Carpenters to the Company, the Plasterers challenge (Br. 12-14, 40-43) the Board's finding by asserting that the Carpenters' strike threats were the product of "collusion" between the Company and the Carpenters. As we now show, the Plasterers fail to demonstrate that the Board erred in rejecting the Plasterers' assertion in *SDI II*. (ER 47.)

As an initial matter, as the Board recognized in *SDI II* (ER 47), "it is well-established that absent affirmative evidence that a threat to take proscribed action is a sham or the product of collusion, the Board will find that it amounts to proscribed conduct under Section 8(b)(4)(D) of the Act." The Plasterers asserted throughout the litigation, and also repeat in their opening brief (Br. 12-14, 40-43), that they should have been able to subpoena information dating back to 2002 that purportedly would have shown payments by the Carpenters to the Company.

However, the Board reasonably found (ER 45, 45 n.7) that such evidence would be insufficient to impugn the veracity of the Carpenters' strike threats. In agreement with the hearing officer and the Regional Director, the Board explained (ER 45 n.7) that "the evidence sought in those documents would not be relevant" to the allegation of collusion because it "would not tend to prove or disprove [the]

Plasterers' claim that [the] Carpenters' threat was fabricated or collusive.”¹⁸

Accord Plumbers, Local 562 (C&R Heating Serv. Co.), 328 NLRB 1235 (1999)

(refusing to let union “engage in fishing expedition” to establish collusion absent affirmative evidence of it). Thus, despite the Plasterers' proffer (Br. 12-14)—that one financial report form showed a payment from the Carpenters to the Company, and that the Carpenters were paying the Company's legal bills—the Board reasonably found (ER 36, ER 45 n.7, SDI ER 1-5, 6, SER 21-24) that such a proffer, without more, does not constitute affirmative evidence that the Carpenters' threat to strike was a sham.

The Plasterers err in relying (Br. 41-42) on *Constr. & Gen. Laborers Local 190 v. NLRB*, 998 F.2d 1064, 1066 (D.C. Cir. 1993). The court remanded the case to the Board so that it could examine a proffer of evidence concerning financial transactions between a union trust fund and an employer to assess its relevance to the jurisdictional issue of collusion. 998 F.2d at 1066-1067. By contrast, in *SDI II*, the Board did consider the Plasterers' proffer as it related to collusion, but

¹⁸ See also Regional Director's Order Denying Appeal to Hearing Officer's Ruling, (SER 16-20, at 19) (“documents pertaining to any discussions about payments or showing actual payments from the Carpenters to the [Company] from January 1, 2002 to the present would not, in and of themselves, tend to prove or disprove that the threat underlying the present dispute was fabricated or collusive”) (affirmed by Board in Special Appeal Decision dated December 21, 2007, SDI ER 6).

reasonably determined it was not sufficient to establish that the Carpenters' strike threats were a sham. (ER 45 n.7, 47, 47 n.22.)

In sum, the Board reasonably found that the Carpenters' threats to strike were genuine, and that the speculative claims made by the Plasterers were not sufficient to render the threats otherwise.

4. The Board reasonably found that there was no voluntary method for the adjustment of the dispute

The Board found in *SDI I*, which involved only the CSF Fine Arts project in Fullerton, that the parties had no agreed upon method to adjust that dispute. (ER 53.) The Plasterers do not contest that finding. The Board also reasonably found in *SDI II* that the Plasterers failed to demonstrate "satisfactory evidence" that all the parties to the dispute "agreed upon methods for the voluntary adjustment of the dispute" (29 U.S.C. § 160(k)), which spanned 97 jobsites in 12 southern California counties. (ER 47.) Contrary to the Plasterers' claim (Br. 35-40), the Board's finding in *SDI II* is supported by substantial evidence and is not arbitrary or capricious.

The Plasterers have argued throughout these proceedings that a Project Stabilization Agreement ("PSA") provides that the Plan is an agreed-upon method to resolve disputes at three of the jobsites at issue (the Central Los Angeles High School # 2, the East Valley New Middle School # 1, and the Cal Trans

Replacement Facilities Shop # 7). As noted above, however, the dispute in the instant case concerns the Company's plastering work at 97 jobsites in southern California. Accordingly, the Board reasonably found (ER 47) that even "assuming arguendo that the PSA resolves the jurisdictional dispute at 3 of the projects," it would leave unresolved the remaining projects in dispute. (SER 2-5.) It is settled that an agreed-upon method for voluntary adjustment must resolve the entire dispute before divesting the Board of jurisdiction to issue a Section 10(k) award. *See, e.g., Ironworkers, Local 563 (Spancrete Midwest Co.)*, 183 NLRB 1105, 1007 (1970) (finding dispute properly before Board for determination where the parties had no agreed-upon method for the adjustment of dispute at "all [of the] projects involved"). Therefore, the Board reasonably found insufficient evidence to demonstrate that the parties had agreed to a method to resolve their entire dispute.¹⁹

The Board also reasonably determined (ER 47) that because the Company's collective-bargaining agreement with the Carpenters provides another forum for the arbitration of jurisdictional disputes (the Drywall Joint Adjustment Board), there are potentially conflicting forums for resolving the dispute. On this additional basis, the Board (ER 47), applying settled precedent, declined to find

¹⁹ Accordingly, the Board noted (ER 47 n.25) that it was unnecessary for it to pass on whether all three parties were bound by the PSA and the Plan at the three jobsites.

that the parties have an agreed-upon method for the voluntary adjustment of the work in dispute. *See, e.g., Operating Eng'rs, Local 318 (Kenneth E. Foeste Masonry, Inc.)*, 322 NLRB 709, 712 n.9 (1996) (“[t]he possibility of conflicting awards means that if the Board does not resolve the dispute, it may not be resolved definitively”).²⁰

The Plasterers err in contending (Br. 37-40) that the Board incorrectly relied on *Spancrete*, 183 NLRB 1105 (1970), in finding that the parties lacked an agreed-upon voluntary method for resolving their dispute. In *Spancrete*, the Board held that all jobsites in dispute must be resolved before the Board will refrain from

²⁰ The Plasterers do not challenge this independent finding in the argument section of their opening brief. They merely assert (Br. 15) in their Statement of Facts that the PSA has a supremacy clause that would trump the Carpenters’ collective-bargaining agreement. This assertion, presented without argument or development, is not properly before this Court because it was summarily raised. *See Fed. R. App. P. 28(a)(9)* (party must raise contentions and reasons for them with citations to authority). Although the putative amicus appears to raise the claim more directly in its proposed brief (Prop. Amic. Br. 24-26), it is well-settled that an amicus cannot expand the scope of appeal to raise issues not argued by the parties. *See Eldred v. Reno*, 239 F.3d 372, 378-79 (D.C. Cir. 1991), *aff’d*, 537 U.S. 186 (2003) (quoting *Resident Counsel v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993) (“amicus [is] constrained by the rule that [it] generally cannot expand the scope of an appeal to implicate issues not presented by the parties to the appeal”)); *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998) (to the extent that amicus raises issues or make arguments that exceed those properly raised by the parties, court may not consider such issues). In any event, as the Board found (ER 47), and as discussed above, even if the PSA could have resolved the dispute at the three jobsites, it would not have resolved the entire dispute at the remaining sites.

determining the dispute under Section 10(k) of the Act. *Spancrete*, 183 NLRB at 1107. To be sure, the Board noted in *Spancrete* that it might otherwise quash a Section 10(k) hearing if there was a voluntary method for one jobsite, but, in that case, because there was “no agreed-upon method for the adjustment of this basic dispute at all three projects,” it would not do so. *Id.* The Plasterers myopically focus (Br. 37-38) on the Board’s use of the word “might,” asserting that it conflicts with the notion that an agreed-upon method for resolution is a mandatory restriction on the Board’s jurisdiction to decide a 10(k) award. However, there is no conflict whatsoever because the Board is deprived of jurisdiction under Section 10(k) of the Act only if an agreed-upon method resolves “the dispute out of which such unfair labor practice shall have arisen.” *See* 29 U.S.C. § 160(k). Here, as in *Spancrete*, the dispute spans jobsites for which the asserted agreed-upon method is inapplicable, and thus the Board is not deprived of jurisdiction over “the dispute.”

In sum, consistent with its precedent, the Board in *SDI II* decided a far-ranging work dispute that spanned many jobsites, after the Plasterers failed to submit satisfactory evidence that the parties had a voluntary method to resolve the dispute. (ER 47.) Section 10(k) of the Act, by its terms, placed the burden on the Plasterers of showing otherwise, and the Plasterers failed to meet their burden. Thus, the Board was not required to sever the three jobsites from its Section 10(k)

determination, or to refrain from deciding the dispute at the remaining 90-plus jobsites.²¹

5. The Board acted well within its remedial discretion in issuing a broad Section 10(k) award in *SDI II*

There is no merit to the Plasterers' challenge to the broad area-wide award in *SDI II*, covering all company worksites in southern California where the unions' jurisdiction overlaps. Contrary to the Plasterers (Br. 43-44), the Board did not fail to analyze the Carpenters' "proclivity to engage in wrongful conduct." The Board considered this very factor under its two-part test (ER 49, 49 n.34), and found that the "wide breadth of [the] Carpenters' threat here" satisfied the test. Indeed, the Carpenters threatened to strike if the Plasterers attempted to reassign "any work" being performed by its members, and Representative Hubel repeated at the Section 10(k) hearing that the Carpenters would strike if any of their work in California was given to the Plasterers. (SER 3-13.)

The Plasterers err in relying (Br. 44) on *Carpenters Local No. 13*, 331 NLRB 281, 284 (2000), a factually distinguishable case. In that case, the Board

²¹ As the Plasterers observe (Br. 39), in *Plumbers & Fitters Local 761*, 144 NLRB 133, 140 (1963), where pipelaying work at a single jobsite was in dispute, the Board found that the parties had agreed to submit welding work to arbitration and thus the Board quashed the Section 10(k) hearing as to the welding work. The Board then decided the remainder of the dispute. Nonetheless, the result in this single-jobsite dispute does not require the Board, in a multiple-jobsite dispute like the instant case, to "sever[] the disputes" that the Plasterers claim (Br. 39) are covered by the PSA, as the Plasterers mistakenly urge.

had not adjudicated any prior jurisdictional disputes, and there was no indication that the threats were of wide breadth. *Id.* In contrast, here the Board previously adjudicated *SDI I* and the Carpenters' strike threats were of wide breadth, spanning all projects in California. Moreover, in *Local 211 IBEW*, 287 NLRB 930, 934 (1987), the Board issued a broad award in circumstances involving a similar number of unlawful actions, coupled with a prior adjudicated jurisdictional dispute and a broad strike threat. Thus, the Board did not abuse its discretion in ordering a broad area-wide award of work in *SDI II*.

Accordingly, the Plasterers fail to impugn the Board's reasonable finding that they violated Section 8(b)(4)(ii)(D) of the Act by maintaining lawsuits and other actions in contravention of the Board's Section 10(k) awards to the Carpenters. Neither the Board's unfair labor practice findings, nor its underlying Section 10(k) awards, are arbitrary or capricious, and thus this Court should uphold the Board's findings.

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY AWARDING ATTORNEYS' FEES AND COSTS TO THE COMPANY AND THE CARPENTERS FOR DEFENDING AGAINST THE PLASTERERS' UNLAWFUL ACTIONS, AND BY ISSUING ITS CUSTOMARY CEASE-AND-DESIST ORDER AGAINST THE PLASTERERS

The Plasterers and the Company challenge different aspects of the Board's remedial order in the instant case. The Plasterers contend (Br. 56-58) that the Board's award of attorneys' fees and costs is punitive and overbroad, while the

Company contends (SDI Br. 5, 26-28) that the Board's customary cease-and-desist order is too narrow.

Section 10(c) of the Act (29 U.S.C. §160(c)) authorizes the Board, upon finding an unfair labor practice, to order the violator to cease and desist from the unlawful conduct "and to take such affirmative action . . . as will effectuate the policies of [the] Act" The Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board's remedial order is reviewed only for "clear abuse of discretion"). Accordingly, the Board's choice of remedy must be enforced unless the Plasterers show "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996).

As shown below, neither the Plasterers nor the Company have demonstrated that the Board abused its discretion in issuing its remedial order.

A. The Board Acted Within Its Broad Remedial Discretion by Awarding Attorneys' Fees and Costs to the Company and the Carpenters

In this case, the Board ordered (ER 31-32) the Plasterers to reimburse the Company and the Carpenters for reasonable legal expenses and fees associated with the defense of the Pullen and Tortious Interference lawsuits, the Kelly and

Greenberg awards, and the Plan complaint, after the Board issued its Section 10(k) award in *SDI II* on December 13, 2006. As shown above, the Plasterers violated the Act by filing and maintaining those legal actions. Contrary to the Plasterers' contention (Br. 56), the Board's order, which was "aimed at 'restoring the economic status quo'" that would have been obtained but for the unfair labor practices, is not punitive. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188-89 (1973). As we now show, reimbursement of legal fees and costs under such circumstances is a reasonable remedy entitled to deference from this Court.

The Board regularly awards legal expenses and attorneys' fees where a party files an unlawful lawsuit or illegally demands arbitration, and courts have enforced those awards. For example, in *Local 32B-32J, Serv. Emps. Int'l Union v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995), the court enforced the Board's award of litigation expenses where a union's demand for arbitration was an unfair labor practice in violation of the Act's secondary boycott provision. The court recognized that the reason for the award was "not because the [union's] behavior is particularly egregious but rather because the litigation itself is the illegal act." *Id.* The award of litigation costs is "therefore the logical measure of damages" rather than punitive. *Id.*; see also *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 35 (D.C. Cir. 2001) (award of attorneys' fees appropriate where filing of lawsuit was an illegal act).

Similarly, in *Greske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1379 (7th Cir. 1997), the court enforced the Board’s award of attorneys’ fees where an employer unlawfully sued a union in retaliation for picketing. Finding it appropriate to “compensate [a party] for expenses that it would not have incurred in the absence of the baseless state lawsuit,” the court agreed that the Board’s remedy appropriately included “an economic disincentive” to such suits, which “can be a powerful weapon.” *Id.*; *Accord Diamond Walnut Growers, Inc.*, 312 NLRB 61, 71 (1993), *enforced*, 53 F.3d 1085 (9th Cir. 1995). These “underlying principles are equally applicable when a union files an unlawful lawsuit.” *Quick v. NLRB*, 245 F.3d 231, 256 (3d Cir. 2001) (enforcing Board order requiring union to reimburse employee for expenses actually incurred in defending against union’s unlawful collections lawsuit).

The cases cited by the Plasterers (Br. 56-57) do not support their argument that the Board abused its discretion in awarding attorneys’ fees and expenses in the instant case. Indeed, in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), the court recognized that the Board may order a party “to reimburse [individuals] whom he had wrongfully sued for their attorney’s fees and other expenses.” In that case, the court disagreed with the Board that the underlying litigation—criminal trespass charges filed by an employer against union organizers—constituted an unfair labor practice in the first place. Here, by

contrast, as shown above, the underlying lawsuits constituted unfair labor practices.²²

Finally, the Plasterers complain (Br. 57-58) that the Board has not effectively tailored the remedy regarding the Pullen and Tortious Interference lawsuits “to the extent necessary to preserve” the Section 10(k) determinations in *SDI I* and *II*. However, as the Board reasonably found (ER 30-31), both lawsuits, in their entirety, have an unlawful objective of forcing the Company to assign work to the Plasterers that the Board awarded to the Carpenters under Section 10(k) of the Act. Accordingly, the Board acted well within its discretion in ordering the Plasterers to pay attorneys’ fees and costs associated with defending against those lawsuits after December 13, 2006, the date on which the Board issued its Section 10(k) award in *SDI II*.

²² The Plasterers likewise err in relying (Br. 57) on *Teamsters Local 917 v. NLRB*, 577 F.3d 70, 78-79 (2d Cir. 2009), a factually distinguishable case in which the court reversed an award of attorneys’ fees because the sued party had prolonged the litigation in defiance of a discovery order. There is no evidence that the Company or the Carpenters did any such thing here.

B. The Board Acted Within Its Broad Remedial Discretion by Issuing Its Customary Cease-and-Desist Order Against the Plasterers

As noted above, as part of its remedy, the Board ordered the Plasterers to cease and desist from engaging in the unfair labor practices found. Specifically, the Board ordered (ER 31-32) the Plasterers to cease and desist from maintaining the lawsuits, and from threatening to and actually seeking to enforce the grievance arbitration awards and Plan complaint. The Company (SDI Br. 5, 26-28) makes a cursory challenge to the scope of the Board's cease-and-desist remedy, asserting that the Board should have issued a broader order that would have required the Plasterers "to cease and desist from in any manner threatening, coercing, or restraining [the Company] with an object of forcing or requiring the Company to assign plastering work" to the Plasterers.

The Company, however, has makes no showing that the Board abused its discretion in issuing its customary cease-and-desist order, which is limited to the unfair labor practices found. (ER 31-32.) The Company provides no argument or caselaw establishing that the Board was required to go beyond its customary cease-and-desist order under the circumstances of this case. Accordingly, the Company fails to demonstrate that the Board abused its discretion in issuing its customary cease-and-desist order.

In any event, it should be noted that the day after issuing this case, the Board issued its Decision and Order in *Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO & Operative Plasterers' & Cement Masons' Int'l Ass'n, AFL-CIO & Standard Drywall, Inc.*, 357 NLRB No. 179 (2010) (“*SDI IV*”), granting even broader relief than the Company seeks here. Accordingly, the Company has now received all the relief it seeks on review in this case.²³

III. THE COMPANY, AS THE PREVAILING PARTY BELOW, LACKS STANDING TO CHALLENGE THE BOARD’S EVIDENTIARY RULING ALLOWING THE SECTION 10(k) PROCEEDINGS TO BE INCLUDED IN THE RECORD IN THIS CASE

In its petition for review, the Company also challenges (Br. 21-26) an evidentiary ruling that the Board made in the course of finding, as the Company alleged in its unfair labor practice charge, that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by filing lawsuits and other legal actions in contravention of the Section 10(k) awards in *SDI I* and *SDI II*. Specifically, the Board ruled in the instant case that, as an evidentiary matter, the records in the underlying Section 10(k) proceedings should be admitted into the record here. (ER 36.) As shown below, because the Board’s evidentiary ruling did not adversely affect the Company, it lacks standing to challenge the ruling before this Court.

²³ *SDI IV*, which is currently pending before this Court in Case Nos. 12-70151 and 12-70384, reached the Board after the Plasterers yet again pursued enforcement of an arbitration award in contravention of the Board’s Section 10(k) award in *SDI II*.

A. A Party Must Be Aggrieved to Have Standing

Section 10(f) of the Act (29 U.S.C. § 160(f)) provides that “[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals.” Therefore, the Company must be a “person aggrieved” within the meaning of Section 10(f) to have standing in this Court to pursue its challenge to the Board’s evidentiary ruling. Standing to obtain review of a Board ruling as a “person aggrieved” arises only “if there is an adverse effect in fact” on the petitioner. *Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (quoting *Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965)).

Where the Board affords a party all the relief it sought, “it [is] not ‘such a person aggrieved as to be entitled to seek review of the Board’s order in this [C]ourt’” *Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d at 1206 n.8 (citing *Ins. Workers Int’l Union v. NLRB*, 360 F.2d 823, 827 (D.C. Cir. 1966)). Further, an unfavorable ruling contained in an agency’s decision is insufficient to confer aggrieved status on a party. *See, e.g., Sea-Land Serv., Inc. v. Dep’t of Transp.*, 137 F.3d 640, 647-48 (D.C. Cir. 1998) (prevailing party lacked standing to appeal unfavorable statutory interpretation, even though it could be harmful in future litigation); *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1201-03 (D.C. Cir. 1995)

(Shell lacked standing to seek review over “mere disagreement with an agency’s rationale for a substantively favorable decision, even where such disagreement focuses on an interpretation of law to which a party objects”) (internal quotation marks and citations omitted). Otherwise stated, if “the judgment [below] gives a party all the relief requested, [an] appeal may not be taken simply to challenge the . . . reasoning below.” *Sea-Land Serv.*, 137 F.3d at 647.

Rather, in such circumstances, a party can only demonstrate aggrievement if the unfavorable ruling is coupled with imminent harm “caused by the substance of the agency’s adjudicatory action.” *Shell Oil*, 47 F.3d at 1202; *accord Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2002). Neither “[f]uture anticipated injuries” nor “allegations of injury that rest on a hypothetical scenario” are sufficient to show the requisite harm. *Shell Oil*, 47 F.3d at 1201-02. Likewise, the “mere precedential effect” of an agency’s action, without a showing of a cognizable harm, is insufficient to confer standing. *Sea-Land Serv.*, 137 F.3d at 647 (citing *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1328 (D.C. Cir. 1985)).

B. The Company Is Not Aggrieved by the Board’s Evidentiary Ruling

As discussed above, in the instant case, the Board found that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by filing lawsuits and pursuing other legal actions against the Company in contravention of earlier Board Decisions and Determinations under Section 10(k) of the Act. Accordingly, the Board ordered the Plasterers to withdraw the lawsuits and other actions, to reimburse the Company for attorneys’ fees and costs, and to cease and desist from the specific conduct found unlawful. (ER 31-32.) The Company, as the charging party below, thus prevailed as to the unfair labor practice finding, and the Board awarded it full relief.²⁴

The Company makes no attempt to articulate a cognizable harm. To the contrary, citing no case law, the sum total of its argument (Br. 26) as to why it is aggrieved by the Board’s evidentiary ruling is that this Court might “undertake [review]” of the admitted evidence. Given that the Board found in favor of the Company despite its decision to admit the records in the Section 10(k) proceedings

²⁴ The Company’s challenge to the scope of the Board’s remedial Order (discussed at pp.48-49) does not give it standing to challenge the Board’s wholly unrelated evidentiary ruling allowing the underlying 10(k) proceedings into the record. It is settled that a party must establish standing for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Env’tl Serv.*, 528 U.S. 167, 180-81, 185 (2000). There is simply no link—nor does the Company assert one—between the Board’s failure to issue a broad remedial order and the Board’s evidentiary ruling allowing the Section 10(k) proceedings into the record.

over the Company's objections, the Company utterly fails to make the requisite showing that the Board's evidentiary ruling is coupled with imminent harm "caused by the substance of the agency's adjudicatory action." *Shell Oil*, 47 F.3d at 1202.

In sum, the Company prevailed before the Board except as to one unrelated issue regarding the scope of the Board's remedial Order. Having otherwise received the full relief to which it is entitled under the Act, the Company has not suffered any adverse effect in fact as a result of the Board's evidentiary ruling, and is therefore not a party aggrieved by that ruling. In any event, the Company has failed to demonstrate that the Board (SDI ER 6-7, 7 n.1) abused its discretion by following its standard procedure and admitting the records of the Section 10(k) proceedings into evidence in this case.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that this Court should enter judgment enforcing the Board's Order in full and denying both petitions for review.

s/ Julie B. Broido

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National Labor Relations Board

June 2012

STATEMENT OF RELATED CASES

In addition to the cases presently before this Court noted by the Operative Plasterers & Cement Masons Int'l and Local 200 in their Statement of Related Cases, the Board states, pursuant to Circuit Rule 28-2.6(b), that the case *Small v. Operative Plasterers' & Cement Masons Local 200*, 611 F.3d 483 (9th Cir. 2010) was previously heard in this Court and concerns the case being briefed.

ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the brief or addendum of Operative Plasterers & Cement Masons Int'l and Local 200:

Federal Rule of Appellate Procedure 28(a)(9):

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STANDARD DRYWALL, INC.)	
)	Case Nos. 12-70047,
)	12-70139
)	12-70379
Petitioner)	
)	Board Case No.
v.)	21-CA-000659
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
_____)	
)	
OPERATIVE PLASTERS & CEMENT)	
MASONS INT'L AND LOCAL 200)	
)	
Petitioners/Cross-Respondents))	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
STANDARD DRYWALL, INC)	
Intervenor)	
)	
and)	
)	
SOUTHWEST REGIONAL COUNCIL OF)	
CARPENTERS)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12, 321 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
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Dated at Washington, DC
this 15th day of June, 2012

9th Circuit Case Number(s) 12-70047, 12-70139, 12-70379

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