



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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April 8, 2013

Gary W. Shinnars, Acting Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: International Brotherhood of Electrical
Workers Local 98 (LMI Electric, Inc.)
Case 04-CC-090196

Dear Mr. Shinnars:

Enclosed find Counsel for the Acting General Counsel's Exceptions and Brief in Support of Exceptions in the above-captioned matter. Copies of the Brief and Exceptions have been served on this day to the parties listed below by email.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Henry R. Protas".

HENRY R. PROTAS
Counsel for the Acting General Counsel

cc:

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Richard S. Meyer, Esq., Richard S. Meyer Law Offices, P.O. Box 184, Bryn Mawr, PA 19010 (rsmeyer@rsmeylaborlaw.com)
Mr. Anthony Console, 375 Malin Road, Newtown Square, PA 19073 (ampman2@aol.com)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98

and

Cases 04-CC-090196

RICHARD S. MEYER, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, the undersigned Counsel for the Acting General Counsel respectfully files the following Exceptions to the Decision issued by Administrative Law Judge Bruce D. Rosenstein on March 11, 2013:

1. To the Administrative Law Judge's failure to accurately cite and articulate the credited testimony of Anthony Console concerning Timothy Browne's statements to Console made during their April 12, 2012 meeting.¹ (ALJD p. 3, l. 11-22)

2. To the Administrative Law Judge's finding that Browne mentioned Console's supposed unspecified legal issues at their April 12, 2012 meeting for the purpose of demanding

¹ Throughout the Exceptions references to the record and the Administrative Law Judge's Decision will be as follows:

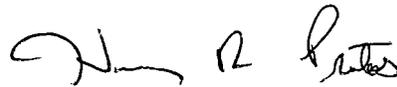
Transcript.....T	(followed by page number)
General Counsel's Exhibits.....GCX	(followed by exhibit number)
Administrative Law Judge's Decision.....ALJD	(followed by page and line number)

that Console sign a collective bargaining agreement with International Brotherhood of Electrical Workers, Local 98 (herein called Local 98). (ALJD p. 5, l. 4-7)

3. To the Administrative Law Judge's finding that the issuance of the fine against Anthony Console was for the purpose of forcing or requiring LMI Electric, Inc. (herein called LMI) to sign a collective bargaining agreement with LMI. (ALJD p. 5, l. 18, 19)

4. To the Administrative Law Judge's use of the terms "induce or encourage" as opposed to "threaten, coerce or restrain" in connection with the fine issued to Anthony Console. (ALJD p. 6, l. 35; Appendix 1. 30)

Dated: April 8, 2013



HENRY R. PROTAS
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215-597-7652

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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INTERNATIONAL BROTHERHOOD OF
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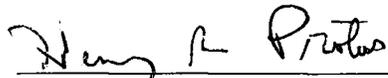
RICHARD S. MEYER, an Individual

**BRIEF BY COUNSEL FOR THE ACTING GENERAL COUNSEL
IN SUPPORT OF EXCEPTIONS**

To: Gary W. Shinnery, Acting Executive Secretary
National Labor Relations Board

Respectfully submitted,

Dated: April 8, 2013



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I. STATEMENT OF THE CASE

The Regional Director issued a Complaint and Notice of Hearing in Case 4-CC-090196 on November 5, 2012¹ (GCX-1(c)), a copy of which was served on the same day on International Brotherhood of Electrical Workers, Local 98, herein called the Respondent or Local 98. (GCX-1(d)) Respondent filed an Answer to the Complaint on November 16, 2012. (GCX-1(e)) On November 9, 2012, the Regional Director issued an Amendment to Complaint deleting paragraph 6 of the Complaint and substituting a revised paragraph 6. (GCX-1(f))

A hearing in this matter was held before Administrative Law Judge Bruce D. Rosenstein on January 22, 2013. At the hearing paragraph 6 of the Complaint was again amended. Paragraph 6 as amended alleges, “An object of Respondent’s conduct described above in paragraph 5 has been to force or require LMI to cease doing business with Post.”² (T-7)

Administrative Law Judge Bruce D. Rosenstein issued his decision in this matter on March 11, 2013. This brief is filed in support of Counsel for the Acting General Counsel’s Exceptions to the Judge’s Decision.

II. STATEMENT OF THE FACTS

LMI Electric, Inc., herein called LMI, is engaged in the construction industry as an electrical contractor. It is owned by Gina Console. LMI’s offices are located in Delaware County, Pennsylvania at the residence of Gina Console and her husband, Anthony Console. (T-16, 17) Anthony Console, who is Vice-President of LMI, runs the company. He does all the bidding, procures manpower and provides job site supervision. (T-17, 44, 45)

¹ Throughout this brief references to the Transcript and Exhibits will be as follows:

Transcript.....T	(followed by page number)
General Counsel’s Exhibit.....GCX	(followed by exhibit number)
Administrative Law Judge’s Decision.....ALD	(followed by page and line number)

² The Judge granted Counsel for the Acting General Counsel’s Motion to Correct the Transcript to properly state the amendment (ALJD p. 2, l. 46-47)

On or about December 14, 2007, Gina Console, on behalf of LMI, signed a letter of assent with International Brotherhood of Electrical Workers, Local 654, herein call Local 654. (GCX-2, T-17, 18, 45) Local 654 is the local of the International Brotherhood of Electrical Workers that has geographic jurisdiction over Delaware County, Pennsylvania. (T-17)

Anthony Console has been a member of Local 654 for about eight years. (T-18, 45) Although the letter of assent binds LMI to a collective bargaining agreement with Local 654, Anthony Console has never seen a Local 654 collective bargaining agreement. Indeed, until sometime shortly after April 12, 2012 he did not even have a copy of the letter of assent. (T-47)

Core Realty is a real estate development company that operates in Philadelphia, PA. It is engaged in rehabbing properties and converting them into residential apartments. Michael Samcheck is its owner. (T-19, 70, 71)

Core Realty had a project located at Front and Brown Streets in Philadelphia. It involved converting an abandoned storage facility into 126 apartments. (T-19, 47) LMI entered into a subcontract with Core Realty to perform some light general contracting, provide the electrical service and wire all the apartments and common areas. (T-19, 47) LMI worked on the project from January 2011 until June 2012. (T-19, 20) With respect to the electrical work, LMI had in addition to Anthony Console up to four employees at any one time working on the project. (T-20, 47, 48) None of these employees were members of a labor organization nor were they paid by LMI in conformity with a collective bargaining agreement. (T-20)

In January 2011, when LMI started work at the Front and Brown Street job, laborers, carpenters, plumbers, glaziers, ironworkers and heating and air conditioning employees were already working there. None of the contractors who employed these employees were signatory to union collective bargaining agreements. (T-20, 21)

Local 98 is a member of the Philadelphia Trades Council and has geographic jurisdiction over jobs performed in Philadelphia. (T-17, 88) Business Representative Stephen Wolfe is Local 98's agent having responsibility for the area in Philadelphia in which the Front and Brown Street project was located. (T-107, 108) Steven Wolfe testified that he visited the job and by inspecting a permit that was posted discovered in either February or March 2011 that Anthony Console and LMI were performing electrical work at the project. (T-107-109, 115) Wolfe had previously met Anthony Console and knew that he was a member of Local 654. (T-21, 107, 108, GCX-6 at 10:00-10:08)

In April 2011, Stephen Wolfe telephoned Anthony Console. He asked Console if he was performing a job at Delaware and Spring Garden Streets. Relying on the fact that Wolfe used an incorrect address, Console told him that he wasn't working there. When Wolfe realized his mistake and gave the correct address, Console finally admitted that he was doing the job. Wolfe asked him if he was doing the job, "union or non-union?" Console responded that the whole job was non-union.³ Console advised Wolfe that he really should have been speaking to Core Realty and Michael Samcheck. Wolfe responded, "Fuck Samcheck. I'm talking to you." Console explained, "Look, you got to talk to Michael Samcheck, I work for him, we're doing this development non-union. Talk to Michael Samcheck." (T-22, 23, 49) Console does not know whether Wolfe contacted Michael Samcheck. (T-49) However, he did not hear anything further from Local 98 until about a year later when he entered into a subcontract to work for Post Brothers. (T-23, 24)

Local 98 resigned itself to the fact that Core Realty was going to finish the Front and Brown Street job on a completely non-union basis and it chose not to picket LMI.⁴ (T-115, 116)

³ There in fact were no union contractors on the job in April 2011 (T-21)

⁴ Indeed there were no protests or picketing by any labor organization for the duration of the job. (T-26)

The issue, however, did not entirely escape Assistant Business Manager Timothy Browne's attention. Sometime in about May 2011, Browne asked Wolfe and Business Representative Bob Thompson what was going on at the job. Wolfe knew that Console was a Local 654 member and that LMI was performing electrical work at this non-union project. He reported these facts to Browne and asked him if Thompson and he could bring charges against Console. Browne responded that it was up to Local 654 to bring charges against its member, not Local 98. At this point, Local 98 dropped the issue.⁵ (T-116, 117)

Post Brothers, herein called Post, is another developer in Philadelphia. It has a job very similar to the Core Realty's Front and Brown Street job. Post is converting a building known as the Goldtech building located at 12th and Wood Streets in Philadelphia into 163 residential apartments. The project is just 15 or 16 city blocks from Core Realty's project. (T-23, 24) Like Core Realty, Post has been performing the job using non-union contractors. (T-25) Unlike with respect to the Core Realty's project, unions involved in the building trades have vigorously protested at the job site. Except for a moratorium lasting about 20 days, unions have been present every day that the project has been under way. About 20 or 30 individuals are generally at the site each day with some carrying signs. In addition to picketing there has been blocking of ingress and egress and violence. As of the date of the hearing in this matter, this activity was ongoing. (T-15, 25, 26, 51, 52)

Apparently undeterred by the protests, LMI entered into a subcontract with Post to provide the electrical service at the Goldtech building. (T- 33, 65, 66, 110) In March 2012, after

⁵ Timothy Browne admitted he had passed by the job and had been well aware of it. Browne is in charge of all of Local 98's organizing and this was large project located in the central core of Philadelphia. Yet he claimed that he never dreamed that it was a non-union project. (T-69, 94) He further claimed that he didn't know until March 29, 2012, that a Local 654 member, Console, like every other person on the job, was working on a non-union basis. (T-78, 94, 95) This testimony, of course, is directly contradicted by the fact that in response to Browne's inquiry, Wolfe and Thompson reported Console's conduct to him early on in the project and that it was Browne who counseled them against bringing charges against Console. (T-116, 117)

LMI had already entered into the subcontract, Console received a phone call from Michael Samcheck. (T- 24, 25, 50) Although neither Samcheck nor Core Realty was involved in the Goldtech project, Samcheck called Console and told him that Stephen Wolfe wanted to speak to him about the project. Console called Wolfe before the day was done. Wolfe asked Console if he was doing the Goldtech building job and whether he doing it union or non-union. Console confirmed that he was doing the job and responded that the whole job was non-union. Wolfe asked him if he was willing to sit down and work out a way for Local 98 to get involved. Console agreed to a meeting at Local 98's office on a date and at a time selected by Samcheck and Wolfe. ⁶(T-25-27, 50)

The meeting took place on March 29, 2012. (GCX-6) Michael Samcheck, Anthony Console and Business Representatives Stephen Wolfe, Bob Thompson and Edward Coppinger attended the meeting.⁷ (T-27, 28) Timothy Browne was not present. ⁸ (ALJD p. 5, n. 10)

Stephen Wolfe ran the meeting. Console explained the type of work that he would be doing at the Goldtech building. Wolfe proposed that LMI sign a contract with Local 98. He explained that LMI would need to get a \$50,000 performance bond. Console responded that that was fine and added that he had employees that he would want to get into the union. He stated that if he needed more employees he would get them from Local 98. There was some discussion about testing his employees before they could become journeymen. Console stated something to

⁶ Wolfe claims that the Samcheck recommended the meeting because Console had either just received the subcontract for the Goldtech building or was in the running for it. (T-110, 111)

⁷ Console explained that he had Samcheck with him for "security." (T-50)

⁸ At the Local 98 trial board proceeding that took place on July 19, 2012, Browne stated that he didn't think he was present for the March 29th meeting. (GCX-6 at 17:48 to 18:54) Nevertheless many months later at the hearing in this matter on January 22, 2013, Browne claimed that he was there. His explained that his earlier failure to remember whether or not he was even present was due to the large number of meetings that he attends. (T-88, 89) His confusion did not however prevent him from in the instant proceedings stating in some detail what allegedly happened at the meeting. (T-73-75) Business Representative Edward Coppinger went one step further. While Browne claimed he said very little in the meeting, Coppinger, contrary to Console as well as Browne, testified that Browne actually served as Local 98's spokesman. (T-72, 99)

the effect that he would do the job with Local 98 and expressed the hope that the job would go smoothly like the Front and Brown Street job.⁹ Local 98 gave him an application for a performance bond that he later took to his insurance company. (T-28, 29, 52, 53, 58, 59) The participants in the meeting agreed that they would meet again on April 12, 2012, when Michael Samcheck returned from his vacation. (T-29, 100) At this next meeting Console was to turn in his performance bond. Local 98 and Console were also going to speak in more detail about how they were going to do the job together. (T-29) No one at this meeting protested or objected to the fact that Console had used non-union employees at LMI's Front and Brown Street job. (T-31, 32)

The same individuals except for the absence of Edward Coppinger and the addition of Timothy Browne met at Local 98's office on April 12, 2012. Unlike the previous meeting, Timothy Browne spoke on behalf of Local 98. (T-30; ALJD p. 5, n. 10) The Administrative Law Judge made findings of fact based on the testimony of Anthony Console. (ALJD p. 3, l. 11-21) In Console's words, "Everything changed. We went from working together to there is no way." (T-30) With respect to Console, Browne stated, "We're not even going to get into this, we're not even going to speak about the job because you have problems – legal problems with Local 654." (T-30, 31, 114) Console didn't know that he had any legal problems with Local 654, so he asked Browne what he was talking about. Browne refused to explain and instead advised Console to contact Local 654. (T-31, 114) With respect to the project itself, Browne said that it was a non-union job, that they were picketing it, that the pressure was on and that they weren't going to let up. (T-30, 31) He added that no matter what Console thought, "we" weren't doing the job. He added that Local 98 would be doing it. (T-31) Despite this abrupt turn of events, Browne was not

⁹ As the job was already being picketed, Console's concern with reaching an arrangement with Local 98 was understandable.

personally hostile to Console. In fact, at the end of the meeting he gave him some advice. He told Anthony Console, “Walk away from the job and your legal problems will probably go away.” (T-31) As in the meeting on March 29th no one protested the fact that he had performed the Front and Brown Street job with non-union employees. (T-31)

Although the Administrative Law Judge credited Anthony Console’s testimony concerning the April 12th meeting, his Decision in one respect misstated the evidence. There is no evidence in the record to support the Administrative Law Judge’s statement that Local 98 demanded that LMI enter into an agreement with Local 98 in order to continue working on the Post job. (ALJD p. 3, l. 15-16) Neither Console’s credited testimony nor for that matter the testimony of either Browne or Wolfe suggested that Console in any way indicated that LMI wasn’t still ready and willing to work on the job as a Local 98 signatory or that Local 98 would not have objected to LMI working for Post if LMI still had the opportunity to sign an agreement with Local 98. (T-31, 113-114, 76-80) Contrary to the Judge’s statement the only thing that changed from the March 29, 2012 meeting to the April 12, 2012 meeting was that Local 98 was no longer willing to let LMI under any circumstances do business with a Post at a job that the building trades unions were actively picketing.¹⁰ Browne’s message to Console had nothing to do with whether or not he signed a collective bargaining agreement. It was simple and direct. He told Console, “Walk away from the job and your legal problems will probably go away.” (T-31)

Although LMI had admittedly signed a letter of assent with Local 654, it was run, apparently with Local 654’s acquiescence, with no regard for its union signatory status. Anthony Console never got involved with any aspect of what it meant to be a union contractor. (T-53) At

¹⁰ Browne’s comment that “we” aren’t doing the job, emphasized that Local 98 was no longer going to let LMI work at the Goldtech building even if it did sign a Local 98 contract. The meaning of Browne’s comment that Local 98 would be doing the job is less clear. Given Browne’s stated objection that the job was non-union and that they were picketing, he most likely meant that Local 98 would do the job when Post agreed to hire only union subcontractors. (T-30-31)

the time of the April 12, 2012 meeting Console neither had a copy of the letter of assent nor the contract that it required LMI to apply. (T-47, 54, 56, 57) Having had it suggested that he had legal problems with Local 654, he visited its office a couple days later and asked for and was provided with a copy of the LMI's letter of assent and a copy of the union constitution. (T-32, 57, 58, 62) Notwithstanding what he was told by Local 98, Anthony Console has never been told by Local 654 that he has any legal problems with it. (T-33)

Having been rebuffed in his effort to work at the Goldtech building covered by a contract with Local 98, Anthony Console failed to heed Mr. Browne's advice. LMI did not walk away from its subcontract with Post. LMI started and continues to work at the project notwithstanding picketing by building trades unions. (T-33, 65)

Although no legal problems with Local 654 ever materialized, by letter dated May 25, 2012, Local 98 informed Anthony Console that Local 98 Business Representative Edward Coppinger had filed internal union charges against him. The letter and the enclosed charges dated May 15, 2012 alleged that Console had violated various provisions of the International Brotherhood of Electrical Workers' Constitution. (GCX-3, T-34) The charges didn't explain what Anthony Console had allegedly done in order to warrant them. (T-35) After consulting with an attorney, Anthony Console on June 7, 2012 wrote to Respondent asking for an explanation of the charges. (GCX-4, T-36) By letter dated June 14, 2012, Local 98's Record Secretary Robert Gormerly informed Console that the charges were based on an allegation that from March 2011 to March 2012 he had worked at the Front and Brown Street job performing electrical work along side of three non-IBEW members. The letter also rescheduled his Trial Board hearing to July 19, 2012. (GCX-5, T-37, 38)

The Trial Board took place as scheduled at Local 98's offices. (GCX-6) At the hearing Stephen Wolfe acknowledged that he knew that Anthony Console was a member of Local 654 when he first found him on the job back in about March 2011. (GCX-6 at 10:00 to 10:08) Article 25, Section 4 of the Constitution under which the charges were brought states that, "Charges against members must be submitted to the R.S. of the L.U. in whose jurisdiction the alleged act or acts took place within sixty (60) days of the time the charging party first became aware, or reasonably should have been aware, of the alleged act or acts." (GCX-9 at p. 80) Console asked Wolfe why Local 98 waited so long to bring charges. Wolfe evaded the question stating that he couldn't answer it and claimed that he was just a witness. (GCX-6 at 12:50 to 13:12) Console posed the same question to Edward Coppinger and the Trial Board. Again Local 98 refused to explain why it waited to bring charges for over a year after it discovered Console working at a non-union job. (GCX-6 at 22:45 to 23:00) While this hearing supposedly concerned only the job at Front and Brown Street, Local 98 used it to confirm that Console, contrary to Browne's advice, was doing business with Post at the Goldtech building. (GCX-6 at 24:15 to 24:30)

By letter dated August 16, 2012 Local 98 informed Anthony Console that he had been found guilty of all charges. He was assessed a penalty of \$250,000. (GCX-7, T-40) The conviction and penalty are currently on appeal to the International Brotherhood of Electrical Workers. (GCX-8, T-41, 44)

III. ARGUMENT

- A. Notwithstanding mistatements concerning whether Local 98 sought to have LMI enter into a collective bargaining agreement, the Administrative Law Judge correctly concluded that Local 98 violated Section 8(b)(4)(ii)(B) of the Act by assessing Anthony Console a \$250,000 fine with an object of forcing or requiring LMI to cease doing business with Post.**

1. General principles of law establishing a violation of Section 8(b)(4)(ii)(B) of the Act.

Section 8(b)(4)(ii) (B) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents:

(4) ... (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where ... an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization which has been certified as the representative of such employees under the provisions of Section 9: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

The purpose of Section 8(b)(4)(B) is to shield “unoffending employers and others from pressure in controversies not their own.” *NLRB v. Denver Building and Construction Trades*, 341 U.S. 675, 692 (1951) Thus, proving the existence a primary labor dispute is not a necessary element in establishing a violation of the Act. *International Longshoremen’s Association, AFL-CIO v. Allied International, Inc.*; 456 U.S. 212, 222-225 (2001) Applying this principle in the instant case means that proving the exact nature of Local 98’s goals regarding Post is not required to establish a violation. All elements of a violation are established simply by demonstrating that Local 98 pursued it goals concerning Post by conduct directed against LMI, a stranger to Local 98’s dispute with Post.

It is also not necessary in order to establish a violation to show that the only purpose of the union's conduct was to enmesh neutral employers. As long as one of the union's objectives is unlawful, the conduct violates the Act. *NLRB v. Denver Building and Construction Trades Council*, *supra*, 341 U.S. at 688-89

Two elements are necessary to establish a violation of Section 8(b)(4)(ii)(B). First, it must be shown that the union has threatened, coerced or restrained a person engaged in commerce. Second, it must be established that an object of the union's conduct is to force or require an employer or person not to handle the products of, or to do business with another person. *Iron Workers Local 378 (McDevitt & Street)*, 298 NLRB 955, 958 (1990)

2. Local 98's assessment of a \$250,000 fine against Anthony Console constitutes a threat, coercion or restraint within the meaning of the Act.

Although the Board often finds picketing directed against a secondary employer to be a threat within the meaning of Section 8(b)(4)(ii), picketing isn't the only form of prohibited union conduct. Seeking to fine or fining members for crossing a picket line is also conduct that violates the Act. *I.U.O.E. Local 150 (Harsco Corporation)*, 313 NLRB 659, 669 (1994) Indeed, even when the picketing itself is lawful primary picketing, a union engages in 8(b)(4)(i)(ii) conduct when it fines a member for crossing and working behind an otherwise lawful picket line. *Carpenters Local 316 (Thornhill Construction)*, 283 NLRB 81 (1987); *Plumbers (Hanson Plumbing)*, 277 NLRB 1231 (1985) A fine imposed on a union member who is also an owner or manager of a secondary employer has a natural consequence of threatening the employer and therefore is conduct that comes within the meaning of Section 8(b)(4)(ii). *Ironworkers Local 433 (United Steel)*, 280 NLRB 1325, 1331 (1986) e.g. *Sheet Metal Workers Local 104 (Losli International)*, 297 NLRB 1078, 1087-1088 (1990); *United Scenic Artists Local 829 (Theatre Techniques, Inc.)*, 267 NLRB 858, 863 (1983)

In the instant case, Local 98 readily admits that it assessed a penalty of \$250,000 against LMI's Vice-President Anthony Console. (GCX-1(e), GCX-7, 40) As Console is the individual who runs LMI this penalty is a threat aimed directly at LMI. (T-17, 44, 45) The only issue in

dispute in this matter is Local 98's objective for engaging in this threatening behavior against LMI.

3. An objective of Local 98's assessment of a \$250,000 fine against Anthony Console was to force or require LMI to cease doing business with Post.

The totality of a union's conduct in each situation must be examined to determine whether one of its purposes was to enmesh neutrals in a dispute. *Local Union No. 369, IBEW (Garst-Receveur)*, 229 NLRB 68 (1977)

A union's unlawful objective can be determined by statements made by the union.

A statement establishing that a union has a secondary object for its conduct need not be a threat in itself. In *Service Employees Union, Local 87 (Trinity Maintenance)* 312 NLRB 715, 746 (1993) a comment by a union to a secondary employer that a planned demonstration would be called off if the employer hired a union subcontractor, although not itself a threat, supported a finding of a cease doing business object. Similarly, a union acknowledging to a secondary employer that matters could be "cleared up" if the primary was off the job revealed picketing to have a secondary objective even though the picketing itself did not suggest a secondary object. *Local Union No. 369, IBEW (Garst-Receveur)*, 229 NLRB at 68 Statements that aren't even directed to the secondary employer can reveal that (ii) conduct has a secondary objective. *IUOE, Local 3 (Cross Link, Inc.)*, 340 NLRB 1053, n. 1 (2003); *Tri-State Building and Construction Trades Council (Backman Sheet Metal Works, Inc.)*, 272 NLRB 8, n. 1 (1984)

In Anthony Console' April 12, 2012 meeting with Local 98, Local 98 took positions and made statements that revealed that Local 98 from this point forward had the goal of forcing LMI to cease doing business with Post. Contrary to findings by the Administrative Law Judge, Local 98 did not take this position in support of a demand that LMI sign a collective bargaining

agreement with Local 98. (ALJD p. 3, 11-22; p. 5, l. 4-7; p. 5, l. 18-19) There is no evidence that Anthony Console wavered in his desire to sign an agreement or that his willingness to do so was an issue. Assistant Business Manager, Timothy Browne, who is in charge of Local 98's organizing efforts, however, no longer agreed to have even a contractor willing to enter into a collective bargaining agreement do business with Post. Browne suddenly refused to let LMI sign a Local 98 collective bargaining agreement. (T-114) Browne told Console that he wouldn't even speak to him about the Goldtech building job. (T-30, 31) Although Browne initially claimed that Local 98's change of heart was because Console had legal problems with Local 654, Console had no legal problems with Local 654 then or now. (T-33) This mention of legal problems with Local 654 was simply a veiled threat aimed at keeping LMI from doing business with Post. Indeed, Browne was only able keep the threat of legal problems hovering over Console by refusing to explain what the supposed problems were. (T-31, 114) Browne had no reason to be concerned about LMI's willingness to sign a contract. He proclaimed the true nature of the dispute when he stated that Post was a non-union job that was being picketed, that the pressure was going to be on and they weren't going to give up. (T-31) To eliminate any doubt that the mention of Console's phantom legal problems was just meant to pressure LMI to refuse to do business with Post, Browne explained, "Walk away from the job and your legal problems will probably go away." (T-31)

In addition to his comments about Post, Browne also claimed that he told Console that he could have financial problems with Local 654 because he had worked with non-union employees at the Front and Brown Street job and that Local 98 didn't want to enter into a collective bargaining relationship with someone that had financial problems.¹¹ (T-77, 114) He allegedly

¹¹ Anthony Console credibly testified that no one at this meeting protested the fact LMI had employed non-union employees at the Front and Brown street job. (T-31) Console's testimony was substantiated and Timothy Browne's

expressed the concern that these supposed problems would bankrupt LMI and result in Local 98 not receiving benefit payments. (T-77) What Browne did not explain is why given the fact that Local 654, in fact, had no financial claims against Console, Browne, as Local 98's director of organizing would not have welcomed the opportunity to sign up another contractor.¹²

The timing of a union's conduct can also reveal an unlawful object. In *Operating Engineers Local 101, (St. Louis Bridge)*, 297 NLRB 485, 493 (1989), the respondent union fined certain members ostensibly because they failed to get clearance from the union to work in its jurisdiction. This plausibly valid reason for disciplining the employees was rejected as the union had known about their conduct for some time yet only chose to file charges against them after they crossed picket lines that violated Section 8(b)(4)(B) and/or 8(b)(7)(C) of the Act. The timing of the union's decision revealed that, notwithstanding any legitimate reason the union had for fining the employees, the decision to seek the fines also had an unlawful object that rendered the fines illegal.

Here, LMI had worked as a subcontractor for Core Realty from January 2011 to June 2012. Although none of the subcontractors working in this job employed union members, unions representing the various trades in Philadelphia looked the other way and didn't engage in any protests at the site. (T-20, 21, 26) More importantly, Local 98 learned in April 2011 that the Vice-President of LMI and Local 654 member, Anthony Console was employing non-union employees at that job and was working side by side with them performing bargaining unit

was essentially refuted by Stephen Wolfe. Wolfe testified that after Browne made some vague references to Console having problems with Local 654, Console asked him what the supposed problems were. He recalled that Browne opted not explain what he meant and instead told Console that he would have to speak to Local 654. (T-114)

¹² Edward Coppinger stated that after the March 29, 2012 meeting with Anthony Console, he conferred with Local 654 to confirm that Console was a member of Local 654 and to see if LMI had a contract Local 654. (T-102) Not only were the legal problems referenced by Browne on April 12, 2012 non-existent at the time, it is safe to assume that Coppinger in checking with Local 654 would have also learned that Local 654 had no future plans for pursuing claims against either Console or LMI over their participation in the Front and Brown Street job.

work.¹³ (T-22, 23) The Business Representative responsible for that section of the city reported these facts in about May 2011 to his superior, Assistant Business Manager Timothy Browne. Local 98, like the other trade unions, chose not to not interfere with how Core Realty was getting the job done. After a review of the facts, Browne counseled against bringing charges against Console, noting that he was not even a member of Local 98.¹⁴ (T-116, 117)

The unions representing the building trades had a very different reaction to general contractor Post's efforts to build an almost identical project in the same neighborhood. This non-union project almost throughout has been faced with picketing, blocking and violence. (T-15, 25, 26, 51, 52)

When Local 98 learned that LMI would be performing bargaining unit work for Post it was still unconcerned that Local 654 member Anthony Console was participating in the non-union construction of Core Realty's project. Local 98 had Michael Samcheck of Core Realty set up a meeting between it and Console, not about the Core Realty job, but rather about Post's job at the Goldtech building. (T-24, 25, 26, 27, 42, 50)

As was no doubt clear to Console from the picketing that was already taking place at the Goldtech building, Local 98 was not going to ignore the fact LMI was working non-union for Post as it had with Core Realty. In Console's meeting with the Union on March 29, 2012, Stephen Wolfe proposed a solution. He proposed that LMI go to work for Post as signatory to a

¹³ The work described on the permit reviewed by Local 98 would have made it obvious that LMI had employees in addition to Anthony Console working on the job. (T-20)

¹⁴ Timothy Browne claimed that he did not know that Console, a member of Local 654, had been working on a non-union basis at the 12th and Brown Street job until the March 29th meeting he falsely claimed to have attended. (T-78, 94) In an apparent effort to cast doubt on Wolfe's testimony to the contrary, Edward Coppinger testified that a member could be subject to discipline for failing to bring charges against Console based on the facts that he and Browne supposedly first heard on March 29, 2012. (T-102, 103) Similarly Browne testified that the Constitution provided that upon learning of Console's conduct he was required to act. The suggestion is that if Browne was told about Console back in May 2011, he would not have risked discipline by failing to act upon this information. The fact is, however, Browne acknowledges that Wolfe knew about Console's non-union work long before charges were filed against him. (T-95, 96) Nevertheless, no disciplinary action has been taken against Wolfe. (T-103)

collective bargaining agreement with Local 98. To everyone's satisfaction, Anthony Console agreed to move forward on that basis. (T-28, 29, 90, 91)

However by the April 12, 2012 meeting, Console's agreement to perform the subcontract with Post under contract with Local 98 was no longer good enough. LMI's continued willingness to sign a collective bargaining agreement with Local 98, shows that this issue was irrelevant to Local 98. Browne was concerned with Post and only Post. As he proclaimed the pressure was on and they weren't going to let up. (T-31) The pressure from this point forward would include a secondary boycott.

When it developed that neither Local 98's refusal to enter into a contract with LMI nor its reference to legal problems influenced LMI to cease doing business with Post, Local 98 threatened and ultimately imposed a quarter million dollar fine against Anthony Console. (T-33, 65, 40, GCX-10)

The fact that Local 98 had known that Anthony Console had worked with non-union employees for about a year, yet chose not to file charges against him until he failed to "walk away" from his contract with Post establishes that an object of the fine was secondary. *Operating Engineers Local 101, (St. Louis Bridge)*, 297 NLRB 485, 493 (1989)

Although the timing of the fine in itself reveals that Local 98's object was to force LMI to cease doing business with Post, this conclusion finds additional support from the unprecedented nature and lack of enforceability of the fine. When Stephen Wolfe first told Timothy Browne in about May of 2011 that Local 654 member Anthony Console was working with non-union employees at the Core Realty's job, Browne opined that Console's local, Local 654 should bring charges and not Local 98. (T-116) Browne routinely sits on Local 98 Trial Boards so he would appear to be an authoritative source on whether Local 98 could bring

charges against a member of a different local. (T-81) Indeed, Local 98's evidence of having brought charges against others for having worked under the table or on non-union jobs all involved charges against Local 98 members. (T-84, 85) It was only when LMI started performing a subcontract for Post that Local 98 no longer considered Console's lack of membership in Local 98 to be an impediment to prosecution.

Local 98 had the same lack of concern for procedural issues with respect to the requirement in its Constitution that charges issue within 60 days of when the alleged misconduct was known or reasonably should have been known. (GCX-9 at p. 80) Although Console twice referenced this requirement at his Trial Board proceedings by asking why Local 98 took so long to press charges against him, no one provided an explanation. (GCX-6 at 121:50 to 13:12 and 22:45 to 23:00, T-104) The issue was again raised to no avail in his appeal of Local 98's fine. (GCX-8)

The Administrative Law Judge correctly found that Local 98 only decided to proceed with charges against a non-member when it learned that LMI continued to be intent on doing business with Post. (ALJD p. 4, l 25-27) Similarly, the Administrative Law Judge concluded that the charges were untimely under the International Constitution and therefore should be rescinded. (ALJD p. 4, l. 30-32) The Administrative Law Judge should have further noted that Local 98's decision to proceed with charges it knew to be flawed shows that the charges were pretextual and provides additional support for finding an unlawful object.

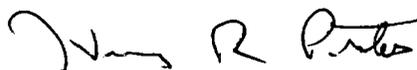
The Acting General Counsel needs to only show that in issuing its quarter million dollar fine against Anthony Console, Local 98 had *an* object of forcing or requiring LMI to cease doing business with Post. However, the fact that when Local 98 finally decided to institute proceedings

against him Local 98 did so with charges so obviously deficient it strongly suggests that Local 98's *only* objective was unlawful.

B. Local 98's \$250,000 fine issued against Anthony Console threatened, coerced or restrained LMI within the meaning of Section 8(b)(4)(ii) of the Act.

Anthony Console is the Vice-President of LMI and runs the company. (T-17, 44, 45) A fine having an unlawful objective under Section 8(b)(4)(B) issued against a principal in a company, such as Console, is considered to be conduct that threatens, coerces or restrains a "...person engaged in commerce or in an industry affecting commerce..." within the meaning of (ii). *Ironworkers Local 433 (United Steel)*, 280 NLRB 1325, 1331 (1986) e.g. *Sheet Metal Workers Local 104 (Losli International)*, 297 NLRB 1078, 1087-1088 (1990); *United Scenic Artists Local 829 (Theatre Techniques, Inc.)*, 267 NLRB 858, 863 (1983) The definition of prohibited conduct defined in (i) is not applicable to him. Therefore, neither the Order nor the Notice should have referred to the fine as issued to Console "in order to induce or encourage him to withhold services from a neutral employer". (ALJD p. 6, l. 35; Appendix l. 30) Rather the Order and Notice should reference the fine as a threat, coercion or restraint against a person engaged in commerce or in an industry affecting commerce.

Respectfully submitted,



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