



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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April 22, 2013

Gary W. Shinnery, 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. Shinnery:

Enclosed find Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions in the above-captioned matter. Copies of the Brief 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:

Stephen J. Holroyd, Esq., Jennings Sigmond, P.C., The Penn Mutual Towers, Independence Square, 510 Walnut Street, 16th Floor, Philadelphia, PA 19106 (sholroyd@jslex.com)
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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

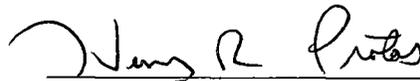
and

Cases 04-CC-090196

RICHARD S. MEYER, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Dated: April 22, 2013



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I. STATEMENT OF THE CASE

The Complaint and Notice of Hearing and the Amendment to the Complaint issued in this matter on November 5, 2012¹ and November 9, respectively. (GCX-1(c); (GCX-1(d)). They allege that Respondent International Brotherhood of Electrical Workers, Local 98 (GCX-1(d)) violated Section 8(b)(4)(ii)(B) of the Act by bringing internal Union charges and a \$250,000 fine against Anthony Console in order to cause Console to cease doing business with Post Goldtex, LP. Respondent filed its Answer on November 16. (GCX-1(e)) At the opening of the hearing before Administrative Law Judge Bruce D. Rosenstein on January 22, 2013, a revised Complaint paragraph 6 was substituted without Objection. As amended, paragraph 6 alleges that “[a]n object of Respondent’s conduct described above in paragraph 5 has been to force or require LMI to cease doing business with Post Goldtex, LP.”² (T-7)

Judge Rosenstein issued his decision in this matter on March 11, 2013. He found that Local 98 violated the Act as alleged. On April 8, 2013, Counsel for the Acting General Counsel and Counsel for Local 98 filed Exceptions to the Judge’s Decision along with supporting briefs. This brief addresses certain assertions Local 98 made in its brief in support of its Exceptions.

¹ Throughout this brief references to the Transcript, Exhibits, Administrative Law Judge’s Decision and Local 98’s brief in support of Exceptions 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)
- Local 98’s Brief in support of Exceptions...98B (followed by page number).

All dates herein are in 2012 unless otherwise stated.

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)

II. STATEMENT OF THE FACTS

For the purposes of this brief, the Statement of Facts set forth in the previously filed brief in support of the Acting General Counsel's Exceptions is adopted herein.

III. ARGUMENT

1. Judge Rosenstein's analysis was based on several factors

Local 98's brief in support of Exceptions asserts that as the basis for his conclusion that Local 98 violated Section 8(b)(4)(ii)(B), Judge Rosenstein appeared to rely entirely on the timing of the internal Union charges and fine levied against Anthony Console. (98B- p. 13) The record shows otherwise. Judge Rosenstein analyzed a number of facts and factors. Local 98's failure to bring charges when it first learned that Console was working with non-Union employees was just one of the factors that the Judge found supporting his finding of a Section 8(b)(4)(ii)(B) violation. Of equal importance were his findings concerning the April 12th meeting in which Local 98 Assistant Business Manager Timothy Browne told Console that Console's legal problems would go away provided that Console "walked away" from doing business with Post Goldtex, LP. (ALJD p. 5, l. 4-8) Judge Rosenstein found additional evidence that the charges and the resulting fine were pretextual based on the fact that there was no evidence that the supposed legal problems with Local 654 actually existed (ALJD p. 5, l. 8-11) and further that the charges that ultimately resulted in Local 98 fining Console \$250,000 were untimely according to the International Union's Constitution. (ALJD p. 4, l. 10-32)

2. **Untimely Union Charges and Fine**

Local 98's brief in support of Exceptions argues that under the terms of International Union Constitution, the internal Union charges were not, in fact, untimely. (98B- p. 14, 15) Article 25, Section 4 of the Constitution under which the charges were brought states that, "[C]harges 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) (emphasis added) While there is no question that Business Representatives Stephen Wolfe and Bob Thompson and Assistant Business Manager Timothy Browne knew all of the relevant facts well outside the 60 day period for the filing of timely charges, (ALJD p. 4, l. 16-20), Local 98 relies on the fact that there was no direct evidence that Edward Coppinger, who formally filed the charges, personally knew until March 29, 2012 the facts upon which the charges were ostensibly based. (98B- p. 15) Even if true, this wouldn't matter. Coppinger is a Local 98 Business Representative. Without any justification, Local 98 would have the Board conclude that when Coppinger filed the charges he did so, not in the capacity for which he is paid, but simply as a member. Local 98 provides no basis to engage in this fiction. As a Business Representative of Local 98, Coppinger is charged with knowing as early as February or March of 2011 that Console was working with non-Union employees. (ALJD p. 4, l. 16-18) Moreover, even if Local 98's argument could be accepted and Local 98's Business Representative could somehow be considered to have been unaware of the facts when the Union he represents first knew them, his charges against Console would still have been untimely. The 60 day period for filing charges runs not just from when the facts are actually known, but also from the time when the charging party *reasonably should have been aware* of them. Thus, in order to find the

charges filed by Coppinger to be timely, the Judge would have needed to find and conclude that it was reasonable for Coppinger to be ignorant of Console's work history. In that context, it is hardly surprising that Judge Rosenstein rejected Local 98's assertion that Coppinger was unaware of facts well known to his fellow Local 98 agents for over a year.

3. **Coppinger's "Need" to Act**

Local 98's brief in support of Exceptions contends that Coppinger filed charges against Console when he did because otherwise he could have faced charges for failing to file charges against someone he knew to be violating the Constitution. (98B- p. 14, 15, 9) However, Local 98 does not dispute the Judge's finding that no charges were brought against Wolfe or Browne even though they chose not to bring Console up on charges about a year earlier knowing full well that Console had been working, and continued to work, with non-Union employees. (ALJD p. 4, l. 16-21, n. 9; 98B- p. 5) Business Representative Stephen Wolfe testified that, upon learning the facts, Browne counseled that charges should not be brought against Console because he was a member of IBEW Local 654 as opposed to Local 98. (T-116) Local 98 states that Wolfe did not file charges against Console or LMI Electric, Inc., because he was working at developing a relationship with the Brown Street developer, Michael Samcheck, hoping that he would hire Local 98 electricians for future projects. (98B- p. 5) Assuming, *arguendo*, that either of these explanations are true, Local 98 failed to explain why it changed course and filed charges against Console about a year later. Local 98 does not suggest that Console became a member of Local 98 and was now subject to its discipline or that it no longer was working at developing a relationship with Samcheck. The only change in the facts from when Local 98 intentionally decided not to file charges against Anthony Console was that Console started doing business

with Post Goldtex, LP, failing to heed Browne's advice to "walk away". There is no other explanation for why in short order the charges were filed and the fine was imposed.

4. **The dispute between Local 98 and Post Goldtex, LP**

Local 98's brief in support of Exceptions states that the record is silent in support of Judge Rosenstein's statement that there was a "clear dispute" between Local 98 and Post Goldtex, LP. (98B- p. 15) This is simply not true. Unlike at Core Realty's (Michael Samcheck's) Brown Street project, unions involved in the building trades vigorously protested at the Post Goldtex, LP job site. Except for a moratorium lasting about 20 days, unions had been present every day that the project was under way. About 20 or 30 individuals were at the site each day, some carrying picket signs. In addition to picketing there was 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) Since only some of the protesters carried signs, Console could not identify all of the trade unions that were present and did not specifically identify Local 98. (T-25) However, Local 98 is a member of the building trades council (T-88) and, more importantly, in his remarks to Console at the April 12, 2012 meeting, Timothy Browne admitted that he considered the picketing against Post Goldtex, LP to be Local 98's picketing. He told Console, "...that job is a nonunion job, we're picketing it, that the pressure is going to be on, we're not going to let up..." (T-31)

5. **Crediting Console**

Local 98's brief in support of Exceptions contends that Anthony Console's lack of clarity concerning LMI Electric Inc.'s 2007 signature on a letter of assent with IBEW, Local 654 puts

into question his credibility as a witness. (98B- p. 20, 21) In fact, any confusion he may have exhibited is completely understandable based on the fact that LMI Electric, Inc. appears to have operated oblivious to any obligations it may have had to Local 654. Console had never seen a collective bargaining agreement and did not have a copy of the 2007 letter of assent until after April 12, 2012. (T-47, 53) Even after Coppinger contacted Local 654 following the April 12 meeting, Local 654 failed to take any action against Console, a small contractor who works out of his house. (T-102, 33)

6. **Negative Inferences**

Local 98's brief in support of Exceptions suggests that a negative inference should be taken from the fact that Counsel for the Acting General Counsel did not call Michael Samcheck as a witness concerning statements made at the meeting between Anthony Console and Local 98 on April 12, 2012. (98B- p. 20) This suggestion is only made possible by the erroneous assumption that Michael Samcheck's allegiance was to Anthony Console. Nothing could be further from the truth. Console found himself meeting with Local 98 only because Michael Samcheck advised him to do so. In consultation with Stephen Wolfe, Samcheck told Console where and when to meet with Local 98. (T- 24-27, 50) At these meetings Samcheck urged Console to sign a collective bargaining agreement with Local 98. (T-112) Although Local 98 did not reveal the exact nature of its relationship with Samcheck, the fact remains that Local 98, as did all the other building trades unions, looked the other way while he used an entirely non-Union workforce to construct a 126 unit apartment building conversion on Brown Street. All Samcheck had to do was look at the protests against Post Goldtex, LP involving an almost identical project for him to recognize that his interests were served by maintaining a good

relationship with Local 98. The idea that he would have had no reason to avoid truthfully testifying against Local 98's interests is preposterous. Local 98's brief in support of Exceptions objects to what it views as the Administrative Law Judge's suggestion that it erred by not calling Bob Thompson as a witness in addition to Browne and Wolfe.³ (98B p. 20) In reality, if negative inferences are to be drawn, one should be drawn from Local 98's failure to call as witnesses both Bob Thompson *and* Michael Samcheck.

IV. Conclusion

Based on the foregoing, Counsel for the Acting General Counsel submits that the arguments made by Local 98 in its brief, as discussed herein, should be rejected, and that the Board should find that Local 98 violated Section 8(b)(4)(ii)(B).

Respectfully submitted,



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³ The inconsistencies between Wolfe's and Browne's versions of what was said at the April 12 meeting have already been reviewed in Counsel for the Acting General Counsel's brief in support of Exceptions.