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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C

UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED WORKERS, LOCAL 162 and A.W. FARRELL & SON, INC. and SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL UNION, NO. 88	CASE NO. 28-CA-023502 **MEMORANDUM OF SHEET METAL WORKERS LOCAL 88 IN OPPOSITION TO ROOFERS' MOTION FOR RECONSIDERATION AND IN SUPPORT OF FARRELL'S COUNTER-MOTION FOR RECONSIDERATION**

Roofers Local 162's Motion for Reconsideration should be denied, but if it is not, the Board should reconsider its entire decision and not merely the remedy, for there has been a serious miscarriage of justice as to this employer.

The motion is procedurally improper because its proof of service shows Roofers never served their motion on the other union which is party to these proceedings, Sheet Metal Workers Local 88 (currently known as SMART Local 88). Failure to serve is alone grounds for denying

a motion under NLRB Rule 102.114 (c). There is no legitimate excuse for this nonservice: the Board's service list shows Local 88 as an interested party and shows Davis Cowell & Bowe as its counsel; Farrell has been including Local 88 on its proofs of service in this proceeding; the undersigned contacted Roofers' counsel to complain that they filed a reconsideration motion under Local 88's name, yet the corrected motion was not served on Local 88 or its counsel. The corrected motion seeks relief directly adverse to Local 88, asking at page 2, paragraph 4 for the notice to be amended to include a declaration that the employer unlawfully recognized Local 88, and asking at page 4 paragraph 4 for the employer to be directed to rescind its agreement with Local 88 and withdraw recognition. As the relief sought by the motion clearly impacts Local 88 adversely, the failure to serve the motion on Local 88 alone warrants denial of the motion under the Board rules.

Those remedial requests by Roofers are nothing short of outrageous. Local 88 joins in the arguments made by Farrell that Roofers' motion failed to present new facts or law justifying reconsideration. Adding to the remedy a declaration that Local 88 was improperly recognized goes far beyond any finding of the ALJ or Board here. Adding to the remedy a directive for Farrell to cease recognizing Local 88 would be overbroad relief because even by Roofers' own admission, they do not claim jurisdiction over metal siding work which has been part of Farrell's business. See Transcript in *Sheet Metal Workers Local 88 & Roofers Local 162*, 28-CD-096857 at pp. 12:7-9, 15:7-8, 15:15-19. Thus it is possible even under Roofers' theory for this employer to recognize and have agreements with two unions. Moreover, the theory is at bottom an effort to enjoy fruit of a poisonous tree: the requested remedies would only reward Roofers for having improperly encouraged Farrell in the first place to breach the travelers' clauses in its agreements with other Sheet Metal Workers local unions. These are provisions binding a contractor like Farrell to the Sheet Metal Workers local-area agreements in other jurisdictions to which it travels to perform covered work. See *A.W. Farrell & Son, Inc. (Sheet Metal Workers Local 88)*, JD-SF 43-10, Case No. 28-CA-22599 (ALJ Parke Nov. 18. 2010); *McKinstry Co. v. Sheet Metal Workers Int'l Ass'n Local 16*, 859 F.2d 1382 (9th Cir. 1988). The Board should reject Roofers' effort by their motion to further prejudice Local 88 from Roofers' inducement of Farrell to

unlawfully shut out Local 88. Moreover, the Board should recall that the employees who were in the Roofers Union in 2010 voluntarily chose in this Right to Work state to join Local 88;[1] the requested change in remedy is thus also contrary to the employees' own choice.

This is not even close to a proper case to take up the interesting issues raised by Roofers as to whether standard NLRB remedies should be strengthened through more expansive postings, longer postings, etc.

Farrell is correct in its argument that if anything is to be reconsidered here due to the passage of time between ALJ and Board decisions, it should be the Board's incorrect conclusion that branch manager Wade Landrum had apparent authority to enter into a contract for Farrell in 2010. There was unrebutted testimony by Landrum that in his communications about negotiation of the agreements, Landrum repeatedly told Roofers' representatives he had no bargaining authority which instead lay with the Company's owner in New York, Bill Farrell. This was the first thing he told them:

> [w]hat I recall from the discussions that I had with Gabbie [Roofers' representative] and the guy, the business manager, they wanted us, Progressive, anyone affiliated with A.W. Farrell to go union. I would say I'm not the guy to talk to. It's Bill Farrell in New York. You know, you can want that all you want, but you know, I'm just the branch manager here. Those aren't my calls.
>
> TR 65:3-0

Asked about the negotiations he explained:

> I didn't have much discussions with them. I sat in on the meetings and they would give us documents which I would ship up to Mr. Farrell.
>
> TR 67:6-8

He testified without rebuttal that when was asked by Roofers representatives about why the Company had not yet signed the 2007-10 contract, he again explained to them how the Company handled labor relations:

> [T]hey were wondering why they didn't have it and I had to tell them I don't sign, that's New York. Mr. Farrell's an older guy and he's sick, so he takes his time about things.

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[1] See Transcript in *Roofers Union (A.W. Farrell)*, 28-CB- 080496 at 312, 316, 318, 328, 337-41, 345-46, 352.

TR 74:18-22

He further testified without rebuttal that the limits on his authority were made clear to Roofers in 2007:

> Q. Who at A.W. Farrell at the time of—at the summer of 2007 or June, 2007 with A.W. Farrell who at A.W. Farrell made decisions regarding union and labor issues?
> A. Bill Farrell.
> Q. What was your responsibility—let me back up. And did you communicate to the representative of Local 162 about what Mr. Farrell's role is and your role for collective bargaining?
> A. Absolutely, yes.
> Q. And when or what did you say?
> A. I don't know exactly when it was, but I know at those meetings I always said I don't make decisions here, I just communicate to Mr. Farrell, he owns the company.

TR 99:7-18.

Judge Parke, one of the most experienced and respected ALJs, did not see a need to repeat all this evidence in her decision, but she was correct in her conclusion that Landrum had no apparent authority as "Landrum clearly and unambiguously notified the Union that only Farrell could agree to the final terms of the 2010-2012 agreement. Refusing to sign the 2010-12 agreement or abide by its terms is not, therefore, unlawful. *Mid-Wilshire Health Care Center*, 337 NLRB 72 (2001)." *A. W. Farrell*, 359 NLRB No. 134 at 8. The previous Board panel overlooked this evidence and focused solely on the facts that a later memo from Landrum disclaiming authority postdated the negotiations in spring 2010 and was not sent to Roofers. But that memo only confirmed what Roofers had been told before August 2010 about how this company's labor relations were structured. That memo was far from the sole evidence of the lack of apparent authority here. There was no reason for Roofers to think that Landrum's role in the company as just information-gatherer had changed over time. Indeed, there was no testimony from the Roofers' representatives that they in fact believed Landrum to have authority to reach a contract. See TR 173-74.

While the Board understandably may not want mere information-collectors to be sent into negotiations, here the only other practical alternative for this company given its owner's

advanced age and infirmity was to not send anyone at all, and just wait until other employers had reached their deal (which would not have been in the Roofers' interest in terms of trying to keep a level playing field between contractors). The Board's desire that negotiators have full power to enter into agreements does not justify disregard of the extensive record evidence here disproving apparent authority by showing notice to the Roofers of Landrum's limited authority. "Apparent authority" doctrine has never been allowed to trump express statements of limited authority. See, e.g., *In re Northlake Dev. L.L.C.*, 643 F.3d 448, 451 (5th Cir. 2011) ("the doctrine of apparent authority is unavailable to one who knows an agent lacks actual authority"). Moreover, the indicators of authority must come from the principal not the agent, and when a party perceives that a proposed agreement will create problems for the principal, that is further warning not to assume the agent is acting within his authority — as was true here, as Roofers were well aware in 2010 of the Company being under pressure from Local 88 about the Company's failure to use sheet metal workers. See *Restatement (Third) of Agency* (2006) § 2.03 ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."; see also Comment (d): "If a third party knows that the actor in question is an agent and knows the identity of the principal, the third party should assess what is observed of the agent in light of the agent's position as a fiduciary with a duty to use authority on behalf of the principal. In a transactional context, the agent's position as a fiduciary should prompt doubt in the mind of the reasonable third party when the agent appears to be using authority to bind the principal to a transaction that will not benefit the principal.").

Another fundamental flaw in the previous panel's decision was the complete absence of a factual predicate for application of the salutary doctrine that bargaining parties are required to send to negotiations representatives clothed with sufficient authority to conduct negotiations effectively. No one asked Landrum for Farrell's position on anything and he didn't venture any position on behalf of his employer. He didn't argue for or against any proposal or point, but

during the meetings only made a single comment (reporting the number of jobs lost). CP Ex. 2B; TR 167. The record is devoid of any evidence that he "negotiated".

The cases relied upon the Board panel are readily distinguishable. In *Sands Hotel*, 324 NLRB 1101, 1109 (1997), the only expressed limit on the negotiator's authority was as to signing and having the proposal "run past" attorneys for a "check over wording." Here, by contrast, the testimony quoted above shows that from the outset Landrum made clear the basic labor relations "decisions" were not his, such as whether to enter into an initial agreement and what would be the terms of later agreements. His notice to Roofers was about much more than just signatures and language-proofing. Similarly inapposite are *Cablevision Industries*, 283 NLRB 22, 29 (1987), *University of Bridgeport*, 229 NLRB 1074 (1977) and *Maury's Fluorescent*, 226 NLRB 1290, 1293 (1976) because they all involved employers making 13th-hour announcements of new limits on their bargaining representatives' authority after those had made proposals unexpectedly accepted by the union, whereas here the announcements by Landrum amply preceded the 2010 meetings on which Roofers' counsel and the Board panel relied, and there were no proposals ever made by Landrum (instead they were made by the other employers present). A finding of apparent authority here is completely contrary to the evidence.

CONCLUSION

Either Roofers' reconsideration motion should be denied, or the Board should reconsider the merits along with the remedy.

Dated: August 14, 2013

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Memorandum of Sheet Metal Workers Local 88 in Opposition to Roofers' Motion for Reconsideration and in Support of Farrell's Counter-Motion for Reconsideration** was filed August 14, 2013, electronically via E-Gov with the National Labor Relations Board, Office of the Executive Secretary and also served on August 14, 2013 by electronic mail to the following:

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Executed on August 14, 2013.

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