UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12

and

Cases 21-CC-072834
21-CC-089199

SHORT LOAD CONCRETE, INC.

and

CHUMO CONSTRUCTION, INC.
Party in Interest

and

GRIFFITH COMPANY
Party in Interest

Lindsay R. Parker, Esq., for the General Counsel.
Hugo A. Tzec, Esq., for the Respondent.
Dwight L. Armstrong, Esq., for the Charging Party.
John S. Miller, Esq., for the Parties in Interest.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on April 16 and 17, 2013, upon the order vacating settlement agreement, order consolidating cases, consolidated complaint and notice of hearing (complaint) issued by the Regional Director for Region 21 on January 17, 2013. The complaint alleges that International Union of Operating Engineers, Local Union No. 12 (Respondent) violated Section 8(b)(4)(ii)(A) of the Act by threatening, coercing, or restraining Chumo Construction, Inc. (Chumo) and Griffith Company (Griffith) to force or require Chumo and Griffith to enter into an agreement with Respondent prohibited by Section 8(e) of the Act. Respondent filed a timely answer to the complaint denying any wrongdoing.

FINDINGS OF FACT

On the entire record, including the briefs from the Acting General Counsel (General Counsel), Respondent, and Charging Party, I make the following

I. Jurisdiction

Respondent denied that Short Load Concrete, Inc. (SLC), a California corporation with an office and place of business in Anaheim, California, is engaged in the business of supplying and delivering concrete. However, Respondent admitted that during the 12-month period ending September 11, 2012, SLC purchased and received at its Anaheim facility goods valued in excess of $50,000 directly from points outside the State of California.

Respondent admitted that Chumo, a California corporation, has been engaged in business as an engineering contractor in the State of California and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a person engaged in commerce or an industry affecting commerce within the meaning of Section 8(b)(4)(ii)(A) of the Act.

Respondent admitted that Griffith, a California corporation, has been engaged in business as an engineering contractor in the State of California and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a person engaged in commerce or an industry affecting commerce within the meaning of Section 8(b)(4)(ii)(A) of the Act.

Based on the above, SLC, Chumo, and Griffith are and have been at all times material employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent admitted in its answer and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. SLC's Business

Ryan Vanderhook (Vanderhook) is the president of SLC. SLC's principal place of business is in Anaheim, California. SLC specializes in supplying rapid strength concrete. This form of concrete achieves a high, early strength compared with traditional concrete. This property makes rapid strength concrete useful on freeway construction jobs. A large percentage of SLC's work involves highway construction or rehabilitation.

SLC stores its volumetric mixer trucks and a substantial portion of the materials used to make concrete at its Anaheim facility. However, SLC uses other locations to store materials to load into its concrete trucks when it is supplying concrete to a jobsite which is located at a long distance from Anaheim. For example, SLC leases a yard from the State of California in Pomona, California. SLC also uses its cement suppliers' facilities in Colton and its sand suppliers'

facilities in Irwindale and San Diego, California, to store concrete components. Further, there are times when SLC uses its customers staging yards near the jobsite to store its materials to make concrete and to reload its trucks. SLC decides when to set up a temporary staging area near the jobsite. SLC always brings its own materials to the temporary staging areas, using its own dump truck or by contracting with an outside hauler. SLC uses its own water trucks and loaders to reload the trucks at temporary staging areas.

B. SLC's Concrete Trucks

SLC uses volumetric mixer trucks, also known as mobile concrete mixers, to deliver concrete. Unlike traditional ready mix concrete trucks that are loaded with concrete at a remote batch plant and driven to the site with the concrete in a rotating cylinder, volumetric mixer trucks contain the components of concrete in discrete tanks containing water, sand, rock, and cement as well as two 35-gallon tanks containing a plasticizer and retarder chemicals needed to make the concrete. The individual tanks on the volumetric mixer truck are loaded with the various components before going to the jobsite. A loader with a bucket is used to add the rock and sand.

Once at the job, the SLC driver or foreman operates a mix auger and conveyor belt system. The concrete components are released from the tanks onto a conveyor belt and are conveyed to the mix auger. The mix auger mixes the components together and the resulting concrete is poured through chutes onto the jobsite. The volumetric mixer trucks can deliver about 10 yards of concrete at a time in about 10 minutes. When the volumetric mixer truck needs to be replenished with rock, sand, water, or cement, it goes to a site where the components are stored and the tanks are refilled. As noted above, sometimes the site is near the construction site at other times it is more remote. However, in half of SLC's jobs, its trucks are loaded at its facility in Anaheim, California. Other than delivering concrete to its customers, SLC does no other construction site work.

All volumetric mixer trucks, including SLC's, must be calibrated by an employee of the State of California on a monthly basis before they can make concrete. As part of the calibrations, the rock and sand gates are fixed by the State employee and cannot be adjusted by SLC employees.

The instant dispute involves the delivery of concrete by SLC to highway rehabilitation projects for general contractors Chumo and Griffith in southern California. A highway rehabilitation project involves the removal of damaged sections of highway pavement by the general contractor. SLC's job is to pour new concrete into the removed portions of the highway. When SLC has at least two or three trucks at a jobsite, it sends a foreman to help unloading the trucks.

SLC's foreman at the jobsite communicates with the general contractor to determine when and where the concrete is to be poured. The foreman shows SLC's drivers where to park the trucks and directs the drivers where to pour the concrete. Once the truck is at the site of the concrete pour, the foreman operates the truck's controls and pours the concrete where directed by the general contractor. SLC employees never engage in finishing the concrete, nor do they remove the damaged concrete. Once the concrete has been unloaded from the truck, the driver moves forward to a wash out area to clean out the mix auger and the chutes and returns to SLC's

yard to get another load. At the jobsite, there is virtually no interaction between the SLC's employees and the general contractor or subcontractors' employees.

C. The Jobsites in Dispute

1. The Chumo jobsite

About November 5, 2010, Chumo and SLC, Inc. entered into a Purchase Agreement[1] for SLC to provide materials and perform concrete delivery work, including mixing and pouring of concrete, for Chumo for project no. 07-253304 of the California Department of Transportation (Caltrans) on State Route 60 in southern California in Los Angeles County, near Diamond Bar. The work involved freeway rehabilitation of 14 miles of State Route 60. SLC supplied concrete for this project for 53 days between April 2011 and July 2012. During the time SLC supplied concrete to Chumo, SLC loaded its trucks exclusively from its Pomona yard located a few miles from the jobsite.

On the Chumo jobsite, SLC only poured concrete where the excavated sections of the highway had been removed. SLC employees did not finish the concrete. As noted above, when the concrete was unloaded the drivers went to the wash out area, washed out their trucks and returned to Pomona for another load. Unless a number of trucks were in line to pour concrete, SLC's concrete trucks would be off the jobsite in 10 to 15 minutes. During this project, SLC's trucks were continually on and off the jobsite.

2. The Griffith jobsite

About May 1, 2012, Griffith and SLC, Inc. entered into a Purchase Order[2] for SLC to provide materials and perform concrete delivery work, including mixing and pouring of concrete, for Griffith for project no. 08-472224 of Caltrans on Interstate Highway 15 near Rancho Cucamonga in southern California.

SLC began working on this job in April 2012. The job is expected to be completed in late June or early July 2013. As of the week of April 8, 2013, SLC was still supplying concrete to this project.

Between April 2012 and April 12, 2013, SLC had been at the Griffith jobsite on Interstate 15 supplying concrete about 67 times.[3] SLC poured concrete in the areas designated by Griffith and at the direction of Griffith. SLC's trucks were on the jobsite longer than at the Chumo site because Griffith was not always ready for SLC to pour the concrete. SLC employees performed no work other than delivering the concrete to the Griffith job.

For a short time at the beginning of the Griffith project, Griffith provided SLC with a temporary staging area near the jobsite for SLC to store its rock, sand, and cement to reload its trucks for additional deliveries to the Griffith job. SLC transported its own concrete materials to this temporary staging area and used its own loader to load its trucks at the temporary staging

[1] GC Exh. 14.
[2] GC Exh.15.
[3] GC Exh. 18.

area. Only SLC employees were permitted to reload SLC's trucks at the temporary staging area. SLC stopped using the temporary staging area in about May or June 2012. Since then SLC used its Pomona or Anaheim facility to load and reload its trucks to supply concrete to the Griffith Interstate 15 project. When SLC used the temporary staging area, its trucks always arrived at the jobsite fully loaded from Anaheim or one of SLC's other yards.

D. The Grievances Filed by Respondent

It is undisputed that Respondent and the Associated General Contractors of California (AGC) entered into a collective-bargaining agreement (Master Labor Agreement) effective from July 1, 2010, to June 30, 2013. Both Chumo and Griffith are employer-members of the AGC and are parties to the Master Labor Agreement. It is likewise undisputed that SLC is neither a party to nor bound by the Master Labor Agreement. Article I of the Master Labor Agreement provides:

> 11. Subcontracting Employee rights, Union Standards and Work Preservation:
>
> (d) Definition of Subcontractor:
>
> (1) Subcontractor is defined as any person (other than an employee covered by this Agreement), firm limited liability company or corporation, holding a valid State Contractor's License where required by law, who agrees orally or in writing to perform or who in fact performs for or on behalf of an individual Contractor, or the Subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement.
>
> (e) Neither the Contractor nor any of his Subcontractors shall subcontract any work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work coming within the jurisdiction of the Operating Engineers, or Ironworkers except to a person, firm, limited liability company or corporation party to an appropriate current labor agreement with the appropriate Local Union of Operations Engineers or Ironworkers….
>
> 15. The contractor shall provide in his contract with the Subcontractor, the following provisions:
>
> (a) Any Subcontractor who performs any work or uses equipment on the project within the jurisdiction of the Operating Engineers must be signatory to an appropriate agreement with the Union.

1. The Chumo grievance

From about June 27 to December 1, 2011, the parties stipulated that Respondent prosecuted and pursued a grievance against Chumo alleging that Chumo had breached article l.B., paragraph 11 of the above cited Master Labor Agreement by using SLC on the 60 Freeway rehabilitation project discussed above.[4] The grievance states:

[4] Jt. Exh. 1 and attachment B thereto.

> Beginning April 1, 2011, Short Load Concrete, non-signatory company, started performing work covered by the Operating Engineers as a subcontractor of Chumo Construction, Inc., is in violation of Article I, Paragraph 10, inclusive of the Southern California M.L.A. This grievance is for lost wages and fringes for each workman performing covered work each day at the rate of 63.1 per hour X 8 hours per day. Local #12 is demanding compensatory damages for all wages and fringes owed. This grievance is ongoing until corrected.
>
> 7-Volumetric Mixer Operators
> 1-Auger/Aggregate/Water Mixer Operator
> 1-Loader Operator

From June 27 until approximately December 1, 2011, Respondent pursued this grievance against Chumo. A joint board/grievance hearing was held approximately a month after this grievance was filed. Present at this meeting were representatives from Respondent, from the AGC, and from Chumo. At this meeting the president of Chumo, George Chumo, took the position that Chumo had not done anything in violation of the MLA. Chumo explained during this meeting that SLC was not a subcontractor but a supplier and that SLC did not fit the definition of a subcontractor as defined in the MLA. The parties stipulated that on December 1, 2011, Respondent withdrew its grievance against Chumo and has not pursued the grievance since this date.[5]

On January 18, 2012, SLC filed a charge in Case 21–CC–072834 over Respondent's filing and pursuance of the above-described grievance.[6] Thereafter, on about April 18, 2012, Respondent entered into an informal settlement agreement with Region 21 resolving the allegations contained in Case 21–CC–072834.[7] As part of the settlement agreement, Respondent agreed that it would not "threaten, coerce, or restrain Chumo Construction, Inc., or any other person engaged in commerce or in an industry affecting commerce, by pursuing grievances against them, or otherwise, where an object is to force or require [Chumo] or any other person, to enter into an agreement that is prohibited by Section 8(e) of the Act."

2. The Griffith grievance

About May 17, 2012, the parties stipulated that Respondent filed a grievance against Griffith alleging that Griffith had breached the provisions of the Master Labor Agreement, article 1.B., paragraph 11, subparagraph (e), and paragraph 15, subparagraph (a), by using SLC on the Interstate 15 project discussed above.[8] The grievance states:

> Above company is in violation of the Operating Engineers Master Labor Agreement Sub-Contracting Clause, Article I, paragraph 10E and 14A, inclusive for subcontracting work covered by the Master Labor Agreement. Short Load Concrete is not signed to the appropriate labor agreement with Local 12. Penalties to be $65.54 per hour (wages & benefits) 8 hours per day for each volumetric mixer. Total Penalty: $29,361.92.

[5] Jt. Exh. 1.
[6] GC Exh. 1(a).
[7] GC Exh. 2.
[8] Jt. Exh. 2 and attachment B.

Penalties to be 65.54 per hour for 8 hours per day times 56 shifts for a total of $28, 931.92.

On August 20, 2012, Southern Regional Manager for Griffith Ryan Aukerman (Aukerman) sent a letter[9] to Vanderhook canceling its purchase order with SLC for the Interstate 15 project discussed above. This letter stated in part:

> Please be advised that Griffith Company received a grievance from the International Union of Operating Engineers for doing business with Short Load on the RTE 15 Freeway Caltrans Contract No. 08-472224 in Rancho Cucamonga. The Union is seeking to enforce the Operating Engineers Master Labor Agreement Sub-Contracting clause, Article I, Paragraph 10E & 14A against Griffith for purchasing materials and supplies from Short Load.
>
> Due to the Union's threat to enforce the subcontracting clause against Griffith for doing business with Short Load, it is with deepest regret that Griffith Company terminates our purchase order with you. The Union has forced us to cease doing business with you to supply us with concrete for this project and/or for any other future projects. We thank you for your part in helping us deliver successful projects in the past with our company.

Executive Vice President for Griffith Jaimie Angus (Angus) attended a grievance meeting over this grievance with representatives from Respondent and Griffith in about October or November 2012. At this meeting Griffith took the position that SLC was a supplier and not a subcontractor and therefore that Griffith was not in violation of the Master Labor Agreement.

Griffith stopped doing business with SLC from the date of the above letter until approximately November 5, 2012. Angus said that Griffith could have used SLC on the project between August and November 2012, but didn't because it didn't want to "rack up" the grievance. In November 2012, Griffith was forced to start using SLC to supply its concrete again because it was facing liquidated damages of $20,000 a day if the project wasn't completed on time. The penalties from the grievance would be less in comparison to the potential liquidated damages so in the end Griffith decided to take its chances and continued using SLC on the Interstate 15 project despite the grievance.

The parties stipulated[10] that Respondent pursued the grievance against Griffith from about May 17 until approximately September 11, 2012. On or around September 12, 2012, the grievance was placed in abeyance and has not been pursued by Respondent since that time. However, this grievance has not been withdrawn.

[9] GC Exh. 16.
[10] Jt. Exh. 2.

E. The Analysis

This case requires an analysis of both Sections 8(e) and 8(b)(4)(ii)(A) of the Act to determine if the subcontracting terms of the above cited Master Labor Agreement apply to Chumo and Griffith.

Section 8(e) of the Act provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person . . . Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction.

Section 8(b)(4)(ii)(A) of the Act provides in pertinent part:

> 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 in either case an object thereof is–
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e).

It is clear that the construction industry proviso to Section 8(e) of the Act applies only to work to be performed at the construction site. The Board has held for over 50 years that the delivery and pouring of concrete at a construction site is not onsite work but rather is the delivery of materials. A review of the Board's cases since 1962 reflects this principle.

In *Teamsters Local 559 (Connecticut Sand & Stone Corp.),* 138 NLRB 532, 535 (1962), Connecticut Sand and Stone Corp. delivered concrete in its ready-mix trucks and discharged the load at construction sites into prepared building forms, buggies, and crane haulers under the direction of individuals such as carpenters or masons employed on the jobsite. Connecticut Sand had a collective-bargaining agreement with Teamsters Local 559 covering construction site work that contained subcontracting language requiring it to use union labor. Connecticut Sand had subcontracted delivery of concrete to a construction site to certain independent contractors. Local 559 insisted that the independent contractors sign Local 559's collective bargaining agreement and threatened to shut the job down if they did not.

The Board, in affirming the trial examiner, rejected the Union's argument that it was preserving unit work and found that the Union's action violated Section 8(e) of the Act since the delivery of ready-mix concrete was delivery of materials and did not fall within the construction industry proviso to section 8(e).

In *Teamsters, Local 294 (Island Dock Lumber),* 145 NLRB 484 (1963), enfd. 342 F.2d 18 (2d Cir. 1965), Island Dock was a supplier of ready mix concrete. At the job the excavation

contractor was signatory through the AGC with Local 294. The contract contained a subcontracting clause requiring all construction site work to be performed by subcontractors that are signatory to a Teamsters agreement. Island Dock had no contract with the Teamsters. The Union threatened the excavation contractor that Island Dock drivers could not unload at the jobsite, so the contractor fired Island Dock.

The Union argued that delivery of ready mix concrete was on site work. The Board disagreed and held finding a violation of Section 8(e) that:

> Though the mixing may have taken place on the site, it could equally have taken place off site, the location of the mixing act being highly immaterial to the mixing operation itself. The mixing operation simply consisted of the driver setting the mixer agitator in motion by the use of a lever. The mixing is not therefore necessarily–in the words of the construction proviso–"work to be done at the site." The pouring of the concrete is the essence of and constitutes the actual delivery because liquid concrete, by its very nature, cannot be dumped on the ground at the construction site like other materials. While the liquid concrete is still in the agitator truck, it has not been delivered until the actual delivery by pouring. In *Connecticut Sand & Stone Corp.,* the Board adopted, in the absence of exceptions, the Trial Examiner's finding therein that the mixing and pouring of ready-mix concrete at a construction site is merely the final act of delivery and does not come within the construction industry exemption. We now affirm that finding, and conclude that the mixing and delivery of ready-mix concrete at construction sites is not construction work but is the delivery of a material or product.[11]

Again in *Drivers, Salesmen & Helpers Local 695 (Madison Employers Council),* 152 NLRB 577 (1965), the Board affirmed that the mixing and pouring of ready-mix concrete at a construction site is not construction work but merely the delivery of a material or product. Accordingly, the Board found the clauses in issue did not relate to work to be performed at the jobsite and did not come within the construction industry proviso.

Later in *Teamsters, Chauffeurs, Local 551 (Dravo Corp.),* 176 NLRB 801, 804 (1969), the Board reaffirmed its prior holdings that the activities of ready-mix drivers in delivering ready-mix concrete on the construction site were not engaged in onsite construction work. The Board also affirmed the ALJ who rejected the Union's work preservation argument and found that the contract language and object of the Union's threatened conduct was not to preserve work traditionally performed by DDC employees but to impose the AGC construction agreement elsewhere, namely on Consolidated Freightways where the contract clause did not contain language expressing a purpose of preserving work traditionally performed by DDC employees but was the typical union signatory clause calculated to satisfy union objectives elsewhere.

Finally *Joint Council of Teamsters 42 (Inland Concrete Enterprises),* 225 NLRB 209 (1976), is a case virtually identical to the instant case. In *Inland Concrete Enterprises*, Inland Concrete supplied ready mix concrete using concrete mobile mixers virtually identical to the machines used by SLC herein. ICC, a contractor making manholes and drainage systems was signatory to a collective bargaining agreement with Local 42. The collective bargaining agreement contained a union signatory subcontracting clause. At the construction site, Inland

[11] Id. at 491–492.

Concrete delivered concrete via a mobile mixer to ICC. Local 42 filed a grievance against ICC alleging the use of nonunion Inland Concrete drivers delivering concrete to the ICC site.

Contrary to Respondent's assertion, the administrative law judge in *Inland Concrete,* Id. at 214, gave a thorough description of the nature of the concrete mobile mixer, noting:

> With the concrete-mobile mixer, sand and gravel are loaded into separate bins situated in the center of the vehicle. A bin at the rear of the vehicle also contains cement. Water is stored in a 300-gallon tank behind the cab of the truck. A water pump and hydraulic system are located beneath the sand and gravel storage bins. The discharge chute is situated beneath the cement bin, and the mixing auger is located inside the chute. Dials regulating the mixing of the concrete are located in the center of the truck. Upon arrival at the jobsite, the concrete-mobile driver lowers and places the discharge chute at the rear of the truck in the pouring position. Operation of the controls causes the ingredients to be drawn from the separate compartments into the auger, located in the middle of the pouring chute, which mixes the ingredients. The proportions of the ingredients may be regulated prior to mixing by adjusting dials on the concrete-mobile.

When comparing the description of the concrete mobile mixer described above in *Inland Concrete* with the mixer I have described in the facts herein, any differences are irrelevant. In *Inland Concrete,* Id. at 216–217, the administrative law judge, affirmed by the Board, held:

> Since the Board has held that delivery is not complete until the concrete has been poured, the fact that the supplier operated a concrete-mobile for the mixing and delivery of liquid concrete at the jobsite, here, is insufficient to distinguish the case from *Island Dock.*

Respondent contends that the long line of Board cases from *Teamsters Local 559 (Connecticut Sand & Stone Corp.),* to *Joint Council of Teamsters 42 (Inland Concrete Enterprises),* are inapposite to the use of volumetric mixer trucks. Respondent herein makes the same arguments raised in *Inland Concrete;* that this case is distinguishable from *Island Dock* since the actual mixing operation is performed at the jobsite, and hence constitutes on-site construction work, exempt by the proviso from Section 8(e). The Board and the ALJ in *Inland Concrete* rejected this argument finding that the delivery of concrete via a mobile mixer or volumetric mixer was not on site work but the delivery of materials and not exempt under Section 8(e) of the Act.

Respondent's argument that somehow the nature of the rapid strength concrete used by SLC is somehow distinguishable from the holding in *Inland Concrete,* is without merit. The nature of the concrete has nothing to do with the issue of whether the delivery of concrete is on site work or delivery of materials. The Board has consistently held that while concrete may be mixed on or off site, delivery is not complete until the concrete is poured.

Respondent also argues that since it did not proceed with the grievances in either the Chumo or Griffith case there can be no violation of Sections 8(b)(4)(ii)(A) or 8(e) nor was the settlement agreement with Region 21 breached.

Contrary to Respondent's assertion, the Board has held that the filling of a grievance to enforce an unlawful interpretation of an 8(e) contract clause is coercive and thus constitutes a violation of Section 8(b)(4)(ii)(A) of the Act. *Sheet Metal Workers Local 27 (AeroSonics, Inc.),* 321 NLRB 540, 541 fn. 3 (1996); *Elevator Constructors (Long Elevator),* 289 NLRB 1095 (1988). Here by filing grievances against Chumo and Griffith, Respondent has applied a facially lawful subcontracting provisions in the Master Labor Agreement to require both Chumo and Griffith to cease doing business with SLC and converted the facially-lawful union-signatory subcontracting clause into an unlawful 8(e) provision not protected by the construction industry proviso and violated Section 8(b)(4)(ii)(A).

Respondent also argues that its object in pursuing the Chumo and Griffith grievances was not an unlawful attempt to cause Griffith and Chumo to cease doing business with SLC but rather was a lawful attempt at work preservation.

Respondent's argument that it had a primary "work preservation" object in filing and pursuing the Chumo and Griffith grievances, is of no avail since the Board has held that union-signatory subcontracting clauses are secondary in nature and unlawful, unless privileged by the construction industry proviso. This is so because such clauses not only require the subcontractor to observe economic standards, but also require adhesion to all the contract provisions. *Food & Commercial Workers Local 1442 (Ralph's Grocery),* 271 NLRB 697,697 (1984).

In *Local 1442* at 697 the Board held:

> However, if a subcontracting clause runs to noneconomic items which have the effect of requiring a subcontractor to adhere to working conditions unrelated to economic benefits, then the clause is viewed as being secondary in nature and within the proscription of Section 8(e). Thus, a contract clause which purports to limit subcontracting to employers who are signatories to the union contract, the so-called union signatory clause, violates the Act since such a clause is not designed to protect the wages and job opportunities of unit employees covered by the contract, but rather is directed at furthering general union objectives and regulating the labor policies of other employers.

From the above language of articles 11 and 15 of the Master Labor Agreement, herein, it is apparent that those articles are designed to do more than merely preserve bargaining unit work for unit employees or prevent the erosion of union standards. Rather, it is clear that the articles have an unlawful secondary objective. By their terms they require that any subcontractor wishing to do business with the employers, in this case Chumo and Griffith must assume all the obligations of the contract between the Chumo and Griffith and the Respondent, including such noneconomic terms of the contract as the union-security clause.

Respondent contends that the informal settlement agreement[12] in Case 21–CC–072834 should not be set aside since it did not violate Section 8(b)(4)(ii)(A) of the Act.

For the reasons set forth above, I conclude there is no merit to this argument as Respondent has violated Section 8(b)(4)(ii)(A) of the Act.

[12] GC Exh. 2.

The Board has held that ongoing unfair labor practices will warrant setting aside a settlement agreement. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 53 (2006), and *YMCA of the Pikes Peak Region,* 291 NLRB 998, 1010, 1012 (1988). Board's *Statements of Procedure*, Section 101.9(e)(2). A Regional Director's action of setting aside a settlement and reactivating the previously settled case is reviewable by the administrative law judge and the Board. *Nation's Rent, Inc.,* 339 NLRB 830, 831 (2003).

In the informal settlement agreement in Case 21–CC–072834, approved by the Regional Director for Region 21 on April 30, 2012, Respondent agreed that it would not threaten, coerce, or restrain Chumo or any other person engaged in commerce or in an industry affecting commerce, by pursuing grievances against them, or otherwise, where an object is to force or require or any other person, to enter into an agreement that is prohibited by Section 8(e) of the Act.

Subsequent to signing this settlement agreement, Respondent again filed a grievance against Griffith in Case 21–CC–089199, where the object there was to force Griffith to enter into an agreement that is prohibited by Section 8(e) of the Act. Accordingly, Respondent's post-settlement conduct breached the terms of the settlement agreement in Case 21–CC–072834 and the settlement agreement should be set aside.

Conclusions of Law

1. Short Load Concrete, Chumo Construction, Inc., and Griffith Company are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 12 is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening, coercing, or restraining Chumo Construction, Inc., Griffith Company, or any other person engaged in commerce or in an industry affecting commerce, by prosecuting and pursuing grievances against them, or otherwise, where an object is to force or require Chumo Construction, Inc., Griffith Company or any other person, to enter into an agreement that is prohibited by Section 8(e) of the Act, Respondent Local 12 has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) of the Act.

REMEDY

Having found that Local 12 has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Local 12 violated the Act by filing grievances against Chumo and Griffith, I shall recommend that Local 12 be ordered to withdraw its grievance filed against Griffith Company with the Associated General Contractors of California, Inc. regarding the use of Short Load Concrete, Inc. by Griffith Company.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, International Union of Operating Engineers, Local Union No. 12, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening, coercing, and restraining Chumo Construction, Inc., Griffith Company, or any other persons engaged in commerce or in an industry affecting commerce, when an object is to require Chumo Construction, Inc., Griffith Company, or any other person to cease from doing business with any other person in violation of Section 8(e) of the Act.

(b) Pursuing in any manner its grievance filed against Griffith Company with the Associated General Contractors of California, Inc. regarding the use of Short Load Concrete, Inc. by Griffith Company.

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

(a) Notify Associated General Contractors of California, Inc., in writing, that it has withdrawn its grievance filed against Griffith Company regarding the use of Short Load Concrete, Inc. by Griffith Company.

(b) Within 14 days after service by the Region, post at its [facility] [union office] [hiring hall] in [*city, State*] copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [*date of first unfair labor practice*].

[13] In the event no exceptions are filed as provided by Sec 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102 48 of the Rules and Regulations , be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 29, 2013

_____
John J. McCarrick
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten, coerce, or restrain Chumo Construction, Inc., Griffith Company, or any other persons engaged in commerce or in an industry affecting commerce, when an object is to require Chumo Construction, Inc., Griffith Company, or any other person to cease from doing business with any other person in violation of Section 8(e) of the Act.

WE WILL NOT pursue in any manner our grievance filed against Griffith Company with the Associated General Contractors of California, Inc. regarding the use of Short Load Concrete, Inc. by Griffith Company.

WE WILL notify Associated General Contractors of California, Inc., in writing, that we have withdrawn our grievance filed against Griffith Company regarding the use of Short Load Concrete, Inc. by Griffith Company.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.