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NATIONAL LABOR RELATIONS BOARD
REGION 22

LOCAL 560, I.B.T. And COUNTY CONCRETE CORPORATION	Cases:	22-CC-083895 22-CE-084893 22-CC-099341

RESPONDENT LOCAL 560, IBT BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ DECISION

> The core principle of labor economics is to eliminate variations in the cost of labor from being utilized for competitive advantages amongst industry employers. Establishing and maintaining Area Standard Wages, Benefits and other Economic Conditions is an essential and legitimate objective of labor unions.

FACTUAL STATEMENT

Background and Previous Activities and Cases:

Local 560, International Brotherhood of Teamsters, is a labor organization, which in part, represents employee drivers who are employed by redi-mix concrete suppliers. Local 560 has collective bargaining relationships with a number of employers in the redi-mix concrete business. Additionally, there are other Teamsters locals in the northern New Jersey area that also have

collective bargaining relationships with redi-mix concrete supplying companies. Together, an area standard for wages and benefits has been established.

County Concrete Company, the Charging Party, is engaged in the manufacturing and supplying of redi-mix concrete. While having a representational relationship with Teamsters Local 863 (GC Exh. 4a; TR. 38, L. 12-18) [1], it is not now nor has it ever had a collective bargaining agreement with Local 863. County Concrete pays its drivers approximately $15.00 per hour less than area standards. (GC Exh. 4a; TR. 141, L. 8-14). The hourly rate differential is substantial and upon which area standards can be destroyed.

Local 560 is, and has been, engaged in a campaign to advise the consuming public of its dispute with County Concrete, wherein Local 560 is advertising the fact that County Concrete pays its redi-mix drivers below area standards. As the Board docket will reveal, Local 560 is involved with two (2) separate ongoing unfair practice proceedings. All Local 560 activities in connection with this unfair labor practice, and with the prior unfair labor practice proceeding, involve Local 560's protesting of County Concrete's payment of substandard wages and economic benefits to its employees. Where Local 560 has previously been alleged to have engaged in unlawful conduct, that finding arising in the proceeding before ALJ Esposito, such findings were inextricably based upon the existence of extrinsic evidence of two verbal conversations between Local 560 representatives and neutral employer representatives. In those verbal exchanges, the ALJ found there was sufficient communication, or as Local 560 contends to be miscommunications, that Local 560 was acting with a secondary objective; a "cease doing business" objective. Drawing from statement found to have been made in those verbal conversations, ALJ Esposito based her conclusions regarding an unlawful object. The prior unfair labor practice proceeding which is

[1] Transcript reference to hearing conducted on May 24, 2013. ALJ Decision reference is to the Decision of July 26, 2013.

separate from the instant proceeding is currently within the review process, and thus without final resolution.

At no time during the Hearing of this case was there any contention that County Concrete did pay area standard wages, or that Local 560's claim that County Concrete does not pay area standards is untruthful or a subterfuge. It is acknowledged that County Concrete pays below area standards.

Factual event of this Unfair Practice Charge

On February 28, 2013, Local 560 mailed to various neutral contractors a letter entitled "Winter 2013 Update". It is the issuance of this letter, or more particularly the contents of the letter, which is the subject matter of the current charge and which ALJ Amchan made his conclusion that Local 560 was in violation of the Act. As the Board will readily see from review of the hearing transcripts, there was no testimony taken or any form of extrinsic evidence for consideration in the interpretation and deliberation of the question of whether or not the Winter 2013 letter was unlawful. There was no allegation, and hence no testimony of any verbal conversations, meetings, or picketing activities from which the Winter 2013 letter might be interpreted. The sole focus of the hearing evidence was the "Winter 2013" letter.

As shown by the caption case numbers, the Complaint involves two charges in addition to the charge regarding the Winter 2013 letter. The two charges, 22-CC-08395 – alleging violation of Section 8(b)(4)(ii)(B), and 22-CE-084893 – alleging violation of Section 8(e), were settled long prior to the third charge being filed, and regarding those charges there was no evidentiary hearing or presentment of facts, as the allegations were settled and thus not litigated. The Settlement Agreement contains a non-admissions clause and was an all-party settlement. More importantly, the settlement required Local 560 to post a Notice concerning remedy to the alleged unlawful

conduct. Notice was posted as required and General Counsel does not take issues that notice compliance was not posted. In addition to posting the formal Notice, Local 560 took remedial action to invalidate the offensive provision in the PLA and Local 560/AGC contract addendum; Section 1A and Section 1(q) respectively. (Respondent Exhibit 1, Montalbano Certification, Exh. 4(a)-4(d). As the Local 560 contract with the AGC was not open for re-negotiations until May 2013, the actual text was not subject to physical removal. The Regional Director approved the settlement on August 1, 2012. Local 560 views the date of August 1, 2012 as the commencement date of hiatus.

There were no material facts presented to the contrary, and no contention is present, that between August 1, 2012, this the date when the settlement was approved and the February 28, 2013 mailing of the Winter 2013 letter, Local 560 engaged in any picketing activity or threats to engage in picketing activity. There is a month hiatus in activity and hiatus of some seven (7) months from the date of the Settlement Agreement. Local 560 maintains that the factual existence of "hiatus" of more than seven (7) months is significant factually and legally.

Notably, while ALJ Amchan acknowledged the existence of the prior unfair practice proceeding, and in response to Local 560's argument and position that the facts of the prior proceeding should not be considered within the deliberation and decision of the instant matter as compelled by operation of the hiatus, ALJ Amchen states "I conclude this makes no difference to the outcome of this case." ... I conclude that the Winter Update (letter in question), on its face, is motivated by the Union's intention to discourage signatory contractors from doing business with County Concrete." Pg. 5, L. 36-40. Thus is the Winter 2013 Update letter, solely upon the contents within its four corners, *per se* unlawful?

Review of the contents of the 2013 Winter letter will demonstrate that Local 560 took caution to fully set forth the area standard object of the dispute, to identify County Concrete as the

primary contractor, and to provide the various construction association members, as neutral employers notice that should Local 560 engage in area standards picketing against County Concrete at a common situs project that Local 560 would strictly adhere to Moore Dry Dock standards so as to not enmesh them should a reserve gate system be set up at the gates to the common situs projects. Fair reading of the letter does not support a conclusion of a *per se* "cease doing business" object. If such a conclusion were permitted to stand, then all area standards activities would be deemed *per se* unlawful.

EVENTS AFTER THE AUGUST 1, 2012 SETTLEMENT OF 22-CC-083895 AND 22-CE-084893:

Between August 1, 2013 and the February 28, 2013 mailing of the Winter 2013 letter, Local 560 did not engage in any activities in any way concerning County Concrete. There are no facts to the contrary.

Hiatus (At a minimum – seven (7) months)

On or about February 28, 2013, Local 560 mailed to various redi-mix customers its Winter 2013 Letter.

There is no claim of any extrinsic evidence of verbal communications or any other form of extrinsic evidence from which to interpret this letter as an unlawful threat being conveyed with a secondary object. There is no claim that Local 560 filed any grievance against any "neutral" or for that matter against any "primary" employer from which to interpret an unlawful "cease doing business" object.

Presented for Board review are three Exceptions to the ALJ Decision, in which the ALJ made the finding that the 2013 Winter Letter, as examined within its four corners, violated the

Act. Does the text of the Winter Letter, without consideration of any extrinsic evidence, constitute evidence of the unlawful act of threatening to picket with an object of "cease doing business" and thus being, in violation of Section 8(b)(4)(ii)(B)?

EXCEPTIONS

Exception One

To the ALJ's finding that Local 560 violated Section 8(e), as the charge filed against Local 560 (22-CC-099344), the only charge to be decided by ALJ Amchan, did not allege conduct in violation of Section 8(e). ALJ Decision pg 6, l. 17-18.

The only charge which makes reference to an alleged violation of Section 8(e) is Case No. 22-CE-84893. See Complaint, General Counsel Exhibit 1, which alleged violation was settled and was not litigated before ALJ Amchan. As the matter was not before ALJ Amchan, Respondent Local 560 did not respond and litigate such allegation. ALJ Amchan had no jurisdiction to make a ruling on an alleged Section 8(e) violation. The Complaint does contain summary allegation of the two (2) settled ULP charges as part of General Counsel's pleadings in connection with its motion for summary judgment in which General Counsel seeks to set aside the settlement agreement. An order to set aside the settlement agreement has not been entered, and cannot be entered until there has been a disposition of Charge 22-CC-099341.

Simply stated, the Complaint does not plead that the Winter 2013 letter was in violation of Section 8(e), and accordingly, no finding of a Section 8(e) violation could be made. Respondent timely raised the issue during the Hearing (Tr. 15, L20-22) and specifically, that the charge being litigation, 22-CC-09941, General Counsel Exhibit 1(e), did not contain an allegation of a violation of Section 8(e) (Tr. 18 L-11-17).

It was recognized during the Hearing, and noted by ALJ Amchen within the text of the Decision, that Charges 22 CE-084893 and 22-CC-08395 were settled and that neither was being presented to ALJ Amchan for consideration or decision. The only charge being litigated is Case No. 22-CC-099341. Review of the charge demonstrates that the charge is limited to allegations of violation of Section 8 (b) (4) (b) (ii). There is no allegation of a violation of Section 8 (e).

Nevertheless, ALJ at page 6 of his Decision proceeds with a Section 8 (e) analysis and makes a finding that Local 560 violated Section 8 (e).

There is no remedy for this due process defect other than to refuse to adopt ALJ Amchan's recommendation regarding a Section 8(e) violation.

Exception Two

To the ALJ's finding that the Winter 2013 Update was motivated "on its face" by a cease doing business object in violation of Section 8b(ii)(B).

Fair reading of the text of the Winter 2013 Update reveals without contradiction that Local 560 set forth in unequivocal terms the area standard object of the dispute, clearly identified County Concrete as the primary contractor, stated that it intended to engage in area standards picketing against County Concrete, and provided the various association members, as neutral employers, that should Local 560 engage in area standards picketing against County Concrete at a common situs project that Local 560 would strictly adhere to Moore Dry Dock standards so as not to enmesh them should a reserve gate system be set up at the entrance ways to the common situs projects. Each of these statements are lawful on their face, and being put together does not convert them into being an unlawful and prohibited statement.

There was no extrinsic evidence introduced in the Hearing, and ALJ specifically stated within his analysis that he was not relying upon any extrinsic evidence, from which to determine the nature of the object of the activity was anything but lawful. Accordingly, the only conclusion that can be reasonably made about the ALJ's analysis to support his conclusion of unlawful object is that he adopted a presumption of unlawful actions.

It is Board precedent that when presented with facially lawful activity of a threat to picket, the presumption that the picketing will be conducted in an illegal manner shall not be permitted where there is no substantial evidence to support such a presumption, citing, Retail Clerks Local

344 (Alton Myers Brothers, Inc.), 136 NLRB 1270, 1273 (1962); IBEW Local 453 (Southern Sun Electric Corp.), 242 NLRB 1130, 1131 (1979), *enf'd denied*, 620 F.2d 172 (8th Cir. 1980). (Emphasis added). The federal court also hold that maintaining a presumption of unlawful conduct is without foundation in the National Labor Relations Act, relevant case law, or any general legal principles. In United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 32, AFL-CIO v. National Labor Relations Board, 912 F.2d 1108 (9th Cir. 1990), the Court concluded its opinion holding that the Board's ruling which was based upon a presumption of unlawful conduct was "irrational and beyond the Board's authority." Supra at 1110, citing, NLRB v. Ironworkers Local 433, 850 F.2d 551, 557 (9th Cir. 1988). The Ninth Circuit further rejected the NLRB's attempt to distinguish its position of maintenance of a presumption theory by asserting that it would limit its application to instances of when the threat to picket was in a context where it could reasonably be understood to involve picketing which would have been conducted unlawfully. The Court rejected the Board's attempt to create this moderated position. Supra at page 1110. The Ninth Circuit held firm, and continues to hold firm, that the Board may not presume that a union's action will be conducted in an unlawful manner.

More recently, the Court of Appeals for the District of Columbia in Sheet Metal Workers International Association, Local 15 v. NLRB, 491 F.3d 429 (2007) directly addressed and rejected the Board's concept that a threat to picket may be presumed that the union, when it pickets in the future, will engage in unlawful picketing unless the threat is also accompanied with assurances that the Union will conform its picketing in accordance with Moore Dry Dock standards. The Court looked favorably upon the Union's stated position that it cannot be held to have broken the law by failing to promise that it would not break the law. Supra at page 434.

In Local 15, the District of Columbia Circuit Court of Appeals reviewed and voiced approval of the Ninth Circuit reasoning, and expanded the disapproval of the Board's reasoning. Setting forth its holding in succinct text:

> We therefore adopt the Ninth Circuit's straightforward reasoning that the Board... "could not presume that a union's threat to picket the job was a threat to picket contrary to the law, when picketing at the job could be done in a lawful manner..."; we agree that "such a presumption is without foundation in the Act, relevant case law or any general legal principles". Supra at page 44-45, also citing, Local 32, 912 F.2d at 1110.

ALJ Amchan states that... "while picketing may evoke a response from County's employees, and others, as well as neutrals, the Winter 2013 letter, which was sent only to County's potential customers, could have only one object." This is a faulty conclusion. It need be remembered that this dispute comes within the context of construction, which nearly always involve work of multiple contractors and their suppliers within a common project site. While the Winter letter does alert the potential customers of County Concrete, these being neutral employers, to the existence of a labor dispute between Local 560 and County Concrete, this notice is not unlawful. While the Winter letter does alert the potential customers of County Concrete, as neutral employers engaged in the construction industry, that Local 560 shall engage in area standard picketing against County Concrete, such notice is not unlawful. While the Winter letter does alert the potential customers of County Concrete, as neutral employers, that should Local 560 engage in picketing as a common situs, that it will follow all Moore Dry Dock requirements so as not to enmesh the neutral employer, such notice is not unlawful.

ALJ Amchan is clearly wrong in his conclusion that the Winter 2013 letter can be concluded as having "only one objective". Local 560 has relationships with many construction companies that work on common situs projects as well as relationships with sister construction locals involved in other trade skills that work on common situs projects for the various construction companies. Should Local 560 show up and engage in primary picket at a common

situs project that does not have an established reserve gate, then there is a likelihood that production would suffer and brother and sister union members would lose a day's pay until the general contractor took efforts to set up and give notice of a reserve gate system. By providing advanced notice of Local 560's dispute and activities against County Concrete, but most importantly by providing the common situs contractor with an advanced notice of the benefits of establishment of a reserve gate system, the common situs contractor is enabled to take advanced action to establish and maintain a valid reserve gate system before making arrangements to have County Concrete deliver concrete at the common situs. This is a lawful object, and by fair reading of the Winter 2013 letter may reasonably be concluded as the sole object off the letter. ALJ Amchan's wrongful narrow focus, and apparent unfamiliarity of the respectful relationships within the New Jersey construction industry, led him to an erroneous conclusion.

While it is noted that Section 8 (b) (4) (B) law does recognize that there can be several objects of the activity, and that only one such object has to be a 'cease doing business" object to support a finding of a violations, the Hearing record evidence demonstrates that there is no extrinsic evidence from which to draw an unlawful object upon the text written within the four corners of the letter.

Exception Three

To ALJ's determination to disregard, and his failure to discuss, adhere to, or distinguish hiatus between any threats to picket, and in this matter, hiatus lasting a period of seven (7) months, such that the hiatus operated to distinguish and segregate the prior unlawful conduct, thereby requiring the new conduct to be evaluated on its own basis. The ALJ's failure to apply a hiatus analysis, and to disregard hiatus was error. (ALJ Decision pg. 5, L.16, pg. 6, L.1-4)

There are generally two forms of unlawful picketing; Section 8(b)(7) recognitional picketing; and Section 8(b)(4) secondary cease doing business or jurisdictional picketing. The effect of a union having at one time engage in unlawful activity does not go on forever. The Board

recognizes that a union is entitled to be cleansed of the coloring of unlawful activity through providing a "hiatus" in the picketing.

There is ample case law and Advice Memos on this point of law.

Perhaps the most direct and concise analysis of the concept of hiatus is found in a 1983 Advice Memo concerned picketing by Ironworkers Local 55. It was alleged that Local 55 violated 8(b)(4)(ii)(B) by picketing and threatening to picket a facility owned by U-haul because U-haul was employing Construction, Inc., a non-union contractor. The picketing began on July 11 and continued through July 21. Coincident with the cessation of picketing, Local 55 sent a mailgram both to Construction, Inc. and U-haul disclaiming any secondary or recognitional objects and claimed instead that all activity against Construction, Inc., the primary, would involve area standards object. Local 55 also directly sent a letter to U-haul asserting that it would be engaging in an area standards dispute with Construction, Inc., and that in furtherance of such object it intended to engage in primary picketing of Construction, Inc. at the U-haul premises. There is no indication in the Memo whether the threat to picket Construction, Inc. at the neutral U-haul premises also included a recitation of Moor Dry Dock standards.

Picketing commenced on July 26, providing a hiatus of five (5) days. Division of Advice, through Harold Datz, Associate General Counsel, concluded that the new charge of 8(b)(4) need be dismissed, recognizing the legal concept of "hiatus" between the prior unlawful picketing and the current picketing. Division of Advice stated, "Such a hiatus is an element that can show a real change in the object of picketing, citing the Altamose Construction Co., Advice Memorandum of September 12, 1979, Case 7-CC-1164. The Advice Memorandum noted that the prior finding of illegality was based in substantial part on verbal threats made directly to the neutral U-haul, but that the subsequent picketing activity was focused upon the primary, Construction Co. It was noted that the Union's post-hiatus conduct was consistent with its communications to both the neutral, U-

haul and primary, Construction, Inc., that it would be involved in area standards activity. There was no evidence submitted regarding any conversations or extrinsic evidence involving the neutral other than the picketing which took place at the neutral's premises when the primary, Construction, Inc., was present.

The Division of Advice concluded that there was insufficient evidence to establish that the original unlawful object of cease doing business was renewed by the post-hiatus picketing of the primary. In view of the hiatus and lawful leaflets or handbills advising the public of the area standards dispute with the primary, the Division of Advice concluded that an unlawful object could not be established. Ironworkers Local 55 (Construction, Inc.), Case 7-CC-1252, Advice Memorandum dated August 17, 1983, 1983 W.L. 29413 (N.L.R.B.G.C.).

Hiatus in the Local 55 matter involved a duration of 5 days. A subsequent Advice Memorandum, with the dispute involving picketing with an unlawful recognitional object, involved a situation where the Region found that the Union's picketing between February 5 and March 15 was protected by the secondary proviso of Section 8(b)(7)(c), there was an 8 day hiatus in the picketing, and then with the Union resuming the picketing activity. The ULP charge alleged that the resumed picketing was not protected by the proviso as the picketing continued past a permissible period 30 days when tacked together. The Division of Advice found that the 8 day hiatus between the February 5 through March 15 picketing and the picketing that took place between March 23 and April 4 was a sufficient period such that the two period of picketing should not be tacked together. Division of Advice found the operation of an 8 day hiatus as significant UFCW Local 876 (Samir Mary, Inc.) d/b/a Savewell Supermarkets, Case 7-CP-263, Advice Memorandum dated April 15, 1985, 1985 W.L. 54700 (N.L.R.B.G.C.).

The Division of Advice was also requested to analyze and give direction in area standards picketing case involving an alleged cease doing business object. Local 711 commenced picketing

on November 20th utilizing area standard picket signs. On December 9th, the employer, through its attorney, approached the picket line in order to discuss with the picket line field representatives the nature and the object of the picketing. While initially denying any recognitional or organizational object, the picket line representative finally stated that the picketing would cease only after the employer signed the union contract. Thus, extrinsic evidence of the unlawful reorganizational object had been established. Upon learning of the statement of recognitional and organizational object, as opposed to area standard object, the union's attorney issued a letter to the employer retracting the recognitional object. The union's letter also announced that it would honor a 24 hour hiatus in the picketing, which would then be followed with new picketing solely with an area standard object. The Union did honor a 24 hour hiatus in the picketing before resuming picketing the following day. The Division of Advice isolate the dispute to the question of "Whether the union's picketing, after January 13 (immediately following the 24 hour hiatus) is a continuation of the unlawful picketing that occurred between November 20 and January 12 or whether, in light of the union's disclaimer and the hiatus in picketing, the picketing was privileged area standards picketing." The Division of Advice, through Harold Datz, stated that "In cases where unions have picketed for an unlawful object and thereafter picketed for a different object, the Board has long rejected the 'application of a presumption of the continuity of a state of affairs in construing the legality of picketing where there is no substantial evidence to support such a presumption'", citing, Retail Clerks Local 344 (Alton Myers Brothers, Inc.), 136 NLRB 1270, 1273 (1962); IBEW Local 453 (Southern Sun Electric Corp.), 242 NLRB 1130, 1131 (1979), *enf'd denied*, 620 F.2d 172 (8th Cir. 1980). (Emphasis added). The Division of Advice recognized that the Board determines the new picketing to either be "good" or "bad" for what that picketing is and not by reason of the object or purpose of the earlier picketing, citing, Building and

Construction Trades Council of Philadelphia (Altemose Construction Co.), 222 NLRB 1276, 1280, *enf'd* 547 F.2d 1158 (3d Cir. 1976).

The Division of Advice recognized that the Board has held that an object which is initially recognitional (unlawful) can be sufficiently abandoned to permit area standards picketing when the union disclaims its former object and abandons recognitional activities. The Division of Advice noted that a union's abandonment of a prior unlawful objective is examined closely to determine if the abandonment is merely pretextual and that any disclaimer may be deemed ineffective if the union's new surrounding conduct is inconsistent with the disclaimer. The Division of Advice in giving meaning to the phrase "conduct which is inconsistent" points to the situation where a union, two days prior to the presumption of picketing, informed the employer that the picketing was in support of a demand for recognition and not that of area standards. Again, to make a finding of the existence of pretext and unlawful object the Division of Advice relied upon the existence of extrinisic evidence.

In the Local 711 factual pattern, the union took no action directly inconsistent with the disclaimer. Following the disclaimer there was a 24 hour hiatus in picketing. The period of hiatus, 24 hours. The Division of Advice commented that the hiatus was helpful for demonstrating a cessation of the unlawful object. After the hiatus, the Division recognized the essential requirement of whether or not there was any new evidence to demonstrate that the Union's area standard activity was a pre-text.

The precedent of the Local 825, International Union of Operating Engineers and George Harms Construction Company, case, 273 NLRB 833 (1984) is helpful in understanding a factual situation where the alleged change in object was merely a pre-textual change. In the George Harms case, union representatives met with company representatives and sought to negotiate a contract and recognition. Being unsuccessful in its attempts, the Union commenced picketing

utilizing a picket sign making claim for enforcement of area standards. Unfair labor practice charges were filed alleging violation of 8(b)(4)(d), which resulted in the union sending a disclaimer of interest in the working dispute and agreeing to a cessation of picketing at the job site for a period of 14 days. After the passing of the 14 days, the union returned to picketing utilizing the same sign, which resulted in the Region seeking further restraint of the picketing, which resulted in an Order enjoining the picketing at the job site for 30 days. Thus, there was a hiatus in picketing for 14 days and after a brief resumption of picketing, a second hiatus of a period of 30 days. The union alleged that the hiatus periods acted to "wipe the slate clean" of any claim of unlawful aspects or objects of the prior picketing. After the 30 days hiatus the union once again commenced picketing with area standards signs.

In the Harms case, the ALJ and the Board examined whether the resumed picketing under a claim of area standards was pre-textual. The ALJ and Board recognized that such examination required that there be evidence of the pre-text, demonstrating that the object was not area standards, but rather that of a prescribed object of recognition. The ALJ and the Board noted that the Union had made no attempt to determine whether or not the employer was in fact paying below area standards, and to the contrary found that the project was, pursuant to federal and state statute, a project being performed pursuant to prevailing area standard wages and thereby demonstrated that the wage and benefits paid were no less than the wages and benefits of the Operating Engineers area standards. Thus, there was no evidence that the employer actually was not paying area standards and such, the claim of area standards picketing could be determined as being pre-textual.

The Local 560/County Concrete factual situation is consistent with the hiatus cases, and dissimilar from the George Harms case.

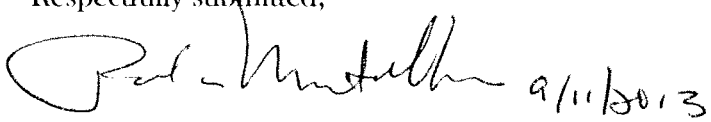
The prior conduct by Local 560 which was the subject matter of the previously settled unfair labor practice was resolved by the settlement. The events which were the subject presented before ALJ Esposito concern events occurring in 2010. The taint of the previously alleged unlawful object was cleansed both by the formal Notice Posting and the seven (7) month hiatus period. General Counsel is not permitted to presume a continuation of such unlawful conduct. General Counsel is not permitted to utilize the evidence of the prior settled charges as new extrinsic evidence to prove its current charges that the Winter 2013 Letter is unlawful.

If there is a determination that the Winter letter is on its own unlawful, General Counsel is then able to proceed on its motion to set aside the Settlement Agreement. Until such time as there has been a finding by the Board that the Winter 2013 letter is "bad", evidence from the various charges that were subject to settlement cannot be used, or "boot strapped" to support argument that the Winter 2013 letter is "bad".

Thus, after giving due respect to the Notice Posting and the hiatus, is the Winter 2013 letter bad? As there is no extrinsic evidence regarding Local 560's object, the only evidence for the ALJ to consider is within the four corners of the Winter 2013 letter. Local 560 maintains it is entitled to a fair reading of the Winter Letter without any presumptions of unlawful conduct. The Winter 2013 letter demonstrates that it is an untainted, unequivocable statement of area standards object. While it is being sent to neutral employers, Local 560 made it clear that County Concrete was the primary, that the object of the dispute was area standards, and that as a secondary employer, the secondary could avail itself of Moore Dry Dock procedures to eliminate, not merely mitigate but to eliminate, any affect the area standards picketing at the common sites may have on the neutral employer. There is nothing more Local 560 was required to do, except perhaps as County Concrete would urge that Local 560 abandon its campaign.

For all of the above reasons, the ALJ's recommended finding and decision should be rejected.

Respectfully submitted,



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