

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OPERATIVE PLASTERERS' & CEMENT MASONS'  
INTERNATIONAL ASSOCIATION, LOCAL 200, AFL-CIO  
AND OPERATIVE PLASTERERS' & CEMENT MASONS'  
INTERNATIONAL ASSOCIATION, AFL-CIO,

Respondents,

and

STANDARD DRYWALL, INC.,

Case Nos.	21-CD-659
	21-CD-660
	21-CD-661

Employer,

and

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS,  
UNITED BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA,

Party in Interest.

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**ANSWERING BRIEF OF OPERATIVE PLASTERERS' & CEMENT MASONS'  
INTERNATIONAL ASSOCIATION, AFL-CIO TO CROSS-EXCEPTION  
FILED BY THE SOUTHWEST REGIONAL COUNCIL OF CARPENTERS**

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Pursuant to sections 102.46(f) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 120.46(f) (2007), Respondent Operative Plasterers' & Cement Masons' International Association, AFL-CIO ("OPCMIA") respectfully submits this Answering Brief to the Cross-Exception filed by the Party-in-Interest, Southwest Regional Council of Carpenters ("Carpenters").

## I. STATEMENT OF THE CASE

On February 11, 2008, Administrative Law Judge (“ALJ”) John McCarrick issued a decision in the above-captioned unfair labor practice proceeding. In that decision, ALJ McCarrick concluded that the Operative Plasterers’ & Cement Masons’ International Association, AFL-CIO and Operative Plasterers’ & Cement Masons’ International Association, Local 200, AFL-CIO (“Local 200”) violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act (“Act”), 29 U.S.C. § 158(b)(4)(ii)(D). (Administrative Law Judge Decision [“ALJD”] at 13, Ins. 5-36.) More specifically, the ALJ found that the OPCMIA and Local 200 violated Section 8(b)(4)(ii)(D) by (1) “pursuing” two awards—commonly referred to as the “Kelly award” and the “Greenberg award”—issued by the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“the Plan”) after the Board issued an award pursuant to Section 10(k), 29 U.S.C. § 160(k), of the Act;<sup>1</sup> (2) by requesting that the Plan issue a complaint over a jurisdictional dispute after the issuance of the Section 10(k) award; and (3) by filing a complaint with the Plan after the issuance of that Section 10(k) award. (ALJD at 13, Ins. 14-24.) The ALJ found that Local 200 further violated Section 8(b)(4)(ii)(D) by “pursuing” two state court lawsuits—referred to as the “Pullen lawsuit” and the “Tortious Interference lawsuit”—after the Board had issued its Section 10(k) award. (ALJD at 13, Ins. 26-33.)

With respect to the remedy, the ALJ recommended that that the Board adopt a remedy that included “an award of reasonable legal fees and costs incurred after December 13, 2006...” by the charging party, Standard Drywall, Inc. (“Standard Drywall”). (ALJD at 14, Ins. 21-23.) This award would include fees incurred by Standard Drywall against Local 200 in conjunction with defending the Pullen and Tortious Interference lawsuits, defending the enforcement of the

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<sup>1</sup> The Section 10(k) award was issued by the Board in *Southwest Regional Council of Carpenters (Standard Drywall)*, 348 NLRB No. 87 (2007) (“*SDI II*”).

Kelly and Greenberg awards. (ALJD at 14, Ins. 23-25.) The award would also include fees incurred by Standard Drywall against the OPCMIA in conjunction with defending the enforcement of the Kelly and Greenberg awards and defending the request for a complaint from the Plan. (ALJD at 14, Ins. 25-27.)

The Carpenters, a party-in-interest in this proceeding, has filed a cross-exception to ALJ McCarrick's recommended order. In its cross-exception, the Carpenters state that its "only exception is to the ALJ's failure to award the Carpenters legal costs and fees in conjunction with defending the Tortious Interference lawsuit filed by Respondent Operative Plasterers' Cement Masons' International Association Local 200 ["Local 200"] on May 14, 2007 in the Superior Court of the State of California." (Carpenters' Cross-Exceptions at 2.) The Carpenters claim they have a "right" to legal fees and costs because the ALJ "decisively" found that the OPCMIA and Local 200 violated Section 8(b)(4)(ii)(D) of the Act, 29 U.S.C. § 158(b)(4)(ii)(D) "in part because if its [sic] Tortious Interference lawsuit against SDI and the Carpenters...." (Carpenters' Brief in Support of its Cross-Exception ["Carpenters' Brief"] at 2.) The Carpenters' cross-exception lacks merit.

## II. ARGUMENT

### A. The Carpenters are not Entitled to a Remedy of Reasonable Attorney's Fees and Costs from the OPCMIA

The Carpenters do not have any right to a remedy of attorney's fees and costs from the OPCMIA. The Carpenters' assertion that the ALJ "decisively" found that the OPCMIA violated Section 8(b)(4)(ii)(D) by filing, maintaining or pursuing the Tortious Interference lawsuit is clearly wrong. The ALJ found that Local 200 violated the Act by pursuing the Tortious Interference lawsuit. (ALJD at 13, Ins. 26-33.) The ALJ did not find that the OPCMIA violated

the Act by pursuing that particular lawsuit. (*Id.*) Consequently, the Board should deny Carpenters' cross-exception with respect to the OPCMIA.

**B. The Carpenters are not entitled to a Remedy of Reasonable Attorney's Fees and Costs from Local 200**

The Board has observed in passing that, "a remedy normally accompanies the finding of a violation...." *Bartlett Heating & Air Conditioning, Inc.*, 339 NLRB 1044, 1046, n.7 (2003). In this case, the pertinent finding of a violation is that Local 200 coerced the Charging Party, Standard Drywall, by pursuing the Tortious Interference Lawsuit with the objective of forcing that employer to reassign plastering work from employees represented by the Carpenters to employees represented by Local 200.<sup>2</sup> (ALJD at 2, Ins. 42-49; ALJD at 11, Ins. 13-32; ALJD at 13, Ins. 26-33.) The remedy that accompanies this finding is that Local 200 must pay the reasonable attorney's fees and costs incurred by the Standard Drywall, for defending against the Tortious Interference lawsuit after December 16, 2007. (ALJD at 14, Ins. 18-27.)

Now, the Party-in-Interest, the Carpenters, seeks to bootstrap itself to the ALJ's finding of a violation and so that it too can share in the remedy of recouping its attorney's fees. The Carpenters argue that Section 8(b)(4)(ii)(D) prohibits labor organizations from coercing any person with an object of forcing or requiring an employer to assign work to one group of employees instead of another group of employees. (Carpenters' Brief at 2.) The Party-in-Interest further observes that Section 2(1) of the Act, 29 U.S.C. § 152(1), defines "person" to include labor organizations. (Carpenters' Brief at 2.) Given the ALJ found that the Tortious Interference lawsuit constituted coercive conduct, the Carpenters claim an entitlement to an award of attorney's fees and costs for defending against that lawsuit "[b]ecause Local 200's

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<sup>2</sup> As the OPCMIA explained in its exceptions to the ALJ's decision, Local 200's pursuit of the Tortious Interference lawsuit does *not* violate Section 8(b)(4)(ii)(D). (*See* OPCMIA's Brief in Support of its Exceptions at 38-41.)

conduct in filing the Tortious Interference action was also aimed at the Carpenters.” (*Id.* at 3.) And, according to the Carpenters, “legal fees are an appropriate remedy for unions that are the subject of unlawful coercion under Section 8(b)(4)(ii)(D).” (*Id.* at 4.)

The Board has recognized that, “[i]t is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is.” *M&M Backhoe Svc., Inc.*, 345 NLRB 462 (2005), *enforced*, 469 F.3d 1047 (D.C. Cir. 2006) (“*M&M Backhoe*”). In *M&M Backhoe*, the ALJ found that the respondent unlawfully ceased making payments to the charging party’s health and welfare fund. The General Counsel filed an exception seeking to modify the judge’s factual findings, legal conclusions and remedy to include unpaid contributions to the charging party’s pension, apprenticeship and vacation funds. The General Counsel argued in support of this exception by citing to the respondent’s stipulation that that it ceased making all contributions to all of funds. *M&M Backhoe*, 345 NLRB at 462.

The Board rejected the General Counsel’s exception. The Board found that, while the complaint alleged that the respondent had ceased contributing to the health and welfare fund, there was no similar allegation that the respondent had ceased contributing to any other fund. It further found that the General Counsel never sought to amend the complaint to add any such allegations and the issue had not been litigated at the hearing. Finally, a majority of the Board parted ways with a dissenting member by finding that “the generalized language in the complaint, alleging that the Respondent ‘changed other terms and conditions of employment,’ is too vague to put the Respondent on notice that its contributions to the pension, apprenticeship and vacation funds were at issue....” *M&M Backhoe*, 345 NLRB at 462-63. The Board reached this conclusion “given that the complaint specifically alleged cessation of payments into the health and welfare fund and omitted mention of any other fund.” *Id.* at 463. *See also*

*International Baking Co. & Earthgrains*, 348 NLRB No. 76, slip op. at 2 (2006) (finding General Counsel's failure to amend complaint to add allegations regarding unlawful statements by Logistics Manager Jesse Medina precludes consideration of allegations, even though complaint contained allegations relating to unlawful statements by other supervisors).

In this case, the Carpenters have not filed an unfair labor practice against Local 200 (or the OPCMIA) claiming that it has been the victim of coercion by Local 200 (or the OPCMIA) undertaken with the objective of forcing an employer to reassign work from one group of employees to another group. *See W.J. Holloway & Son*, 307 NLRB 487, n.2 (1992) (finding by majority that threat to picket was not unlawful because no charge had been filed with respect to threat). By contrast, Standard Drywall filed an unfair labor practice charge alleging Local 200 engaged in such conduct. (*See* Standard Drywall's Answering Brief, Attachment 2.) The unfair labor practice charge led to the issuance of a complaint in which the Acting Regional Director specifically alleged, *inter alia*, that Local 200's pursuit of the Tortious Interference lawsuit coerced Standard Drywall with the objective of forcing that employer to reassign work from the Carpenters-represented employees to the Local 200-represented employees. During the unfair labor practice proceedings, the General Counsel did not argue that there was any alleged unfair labor practice committed against the Carpenters. The General Counsel did not attempt to amend the complaint to add an allegation of any such unfair labor practice. In the post-hearing brief, the General Counsel argued for an award of reasonable attorney's fees and costs *for Standard Drywall*, not the Carpenters. (ALJD at 13, lns. 40-41 (stating General Counsel and Standard Drywall "as part of the remedy herein seek restitution of legal costs and fees in conjunction with defending the Pullen and Tortious Interference lawsuits"). Indeed, after the ALJ issued his decision and recommended order, the General Counsel did not file exceptions or cross-

exceptions seeking to obtain a make-whole remedy for the Carpenters. Given these circumstances, it would be improper for the Board provide the Carpenters with an award of attorney's fees and costs, since such an award would necessarily entail findings of an unfair labor practice never litigated by any of the parties during the unfair labor practice hearing, *viz.*, a finding that Local 200 violated Section 8(b)(4)(ii)(B) by coercing the Carpenters with the objective of having Standard Drywall reassign work from one group of employees to another group. *M&M Backhoe*, 345 NLRB at 462.<sup>3</sup>

Moreover, while the particular allegation in the complaint states that, by engaging in that conduct, "the Respondent Local 200 has threatened, coerced or restrained [Standard Drywall] and other persons engaged in commerce or in industries affecting commerce," the vague reference to "other persons" is insufficient to put Local 200 on notice that any "coercion" of the Carpenters was at issue in this case. *M&M Backhoe*, 345 NLRB at 462-63. If the General Counsel truly intended to pursue the alleged coercion of the Carpenters by Local 200 as a violation of Section 8(b)(4)(ii)(D), then the General Counsel could have specifically identified the Carpenters as an aggrieved party in the Complaint, the First Amended Complaint or the Second Amended Complaint. *Id.* Indeed, the General Counsel could have issued a Third Amended Complaint, adding such an allegation. The General Counsel did none of the above. Consequently, the Carpenters cannot attempt to litigate that issue before the Board. *Id.*

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<sup>3</sup> The OPCMIA further notes that cases such as the Board's decision in *Cardinal Home Prods., Inc.*, 338 NLRB 1004 (2003) are distinguishable on their facts. In *Cardinal Home Prods.*, the Board found that the ALJ properly found an independent violation of Section 8(a)(1) even though the complaint had alleged only a violation of Section 8(a)(3). *Cardinal Home Prods., Inc.*, 338 NLRB at 1007. The Board found that both violations were predicated on the "same set of facts" and were fully litigated at the hearing. *Id.* In this case, the only violation fully litigated in the hearing was the alleged coercion of the Charging Party, *viz.*, Standard Drywall. There was no hint of, let alone litigation over, any alleged coercion of the Party-in-Interest, *i.e.*, the Carpenters.

Finally, the authority cited by the Carpenters in support of its cross-exception does not warrant a different conclusion. The decisions cited by the Carpenters involved cases where the Board awarded reasonable attorney's fees and costs as a remedy for the employer's coercion of a union and several individuals in the exercise of their Section 7 rights, violations that had been litigated during the unfair labor practice hearing. *See Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366 (7th Cir. 1997). As noted above, there was been no finding that Local 200 coerced the Carpenters in any way. Absent a finding of a violation, there is no basis to provide a remedy to the Carpenters.

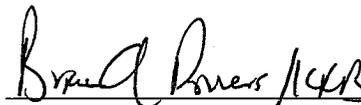
## II. CONCLUSION

Accordingly, for the foregoing reasons, the OPCMIA respectfully requests that the Board deny the Carpenters' cross-exception.

Respectfully submitted,

DATED: May 20, 2008

By:



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 20th day of May, 2008, a true and correct copy of the foregoing "Answering Brief of Respondent Operative Plasterers' & Cement Masons' International Association to the Cross-Exception Filed by the Southwest Regional Council of Carpenters" was served by United Parcel Service, overnight mail, on the following:

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