

**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.

**JOINT ANSWERING BRIEF OF OPERATIVE PLASTERERS' & CEMENT MASONS'
INTERNATIONAL ASSOCIATION, AFL-CIO AND THE OPERATIVE PLASTERERS'
& CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 200, AFL-CIO
TO THE CROSS-EXCEPTIONS FILED BY STANDARD DRYWALL, INC.**

Pursuant to section 102.46(f) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 120.46(f) (2007), Respondents Operative Plasterers' & Cement Masons' International Association, AFL-CIO ("OPCMIA") and Operative Plasterers' & Cement Masons' International Association, Local 200, AFL-CIO ("Local 200") respectfully submit this Joint Answering Brief to the Cross-Exception filed by the Charging Party, Standard Drywall, Inc. ("Standard Drywall" or "SDI").

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, lns. 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;¹ (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, lns. 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, lns. 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, lns. 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

¹ 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, lns. 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, lns. 25-27.)

Standard Drywall, the Charging Party, has filed cross-exceptions to ALJ McCarrick's decision and recommended order. First, Standard Drywall excepts to the ALJ's finding that the Charging Party filed an unfair labor practice charge against the Southwest Regional Council of Carpenters ("Carpenters") on February 7, 2006. Second, Standard Drywall excepts to the rulings of the ALJ and the Board admitting into evidence the records from *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 346 NLRB 478 (2006) ("SDI I") and *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 348 NLRB No. 87 (2007) ("SDI II"). Third, SDI excepts to the anticipated result of the Respondents' exceptions with respect to whether the ALJ found that the entire *Pullen* lawsuit violated Section 8(b)(4)(ii)(D). Fourth, SDI excepts to the ALJ's failure to impose a broad order. Finally, SDI excepts to the ALJ's failure to award interest on the remedy of reasonable attorney's fees and costs as provided in his recommended order.

II. ARGUMENT

A. Exception 1: Standard Drywall's Exception to the ALJ's Factual Finding as to the Charged Party in SDI II is Irrelevant

Standard Drywall challenges the ALJ's finding that the Charging Party filed an unfair labor practice charge against the Carpenters on February 7, 2006. (Standard Drywall's Cross-Exceptions to the Administrative Law Judge's Decision ("Standard Drywall's Cross-Exceptions") at 1, ¶ 1.) This does not change the fact that as explained in the Respondents' briefs in support of their exceptions, there is clear evidence that Standard Drywall instigated the

dispute in an attempt to obtain a broad Section 10(k) award, which takes place against the backdrop of the employer receiving millions of dollars from the Carpenters. (*See, e.g.*, OPCMIA's Brief in Support of Exceptions at 22-23.)

B. Exceptions 2 & 3: The Record in this Section 8(b)(4)(ii)(D) Proceeding Properly Includes the Records From the Underlying 10(k) Proceedings.

Standard Drywall excepts to the ALJ's September 11, 2007 Order on the General Counsel's Motion to Preclude Evidence ("Preclusion Order") to the extent that the ALJ ruled that the record in the two 10(k) proceedings underlying this Section 8(b)(4)(ii)(D) proceeding were made part of the record. (Standard Drywall's Cross-Exceptions at ¶ 2.) Similarly, Standard Drywall excepts to the Board's December 21, 2007 interlocutory order on the ALJ's Preclusion Order to the extent that it ruled that the record in the underlying 10(k) proceedings should be admitted into evidence in this Section 8(b)(4)(ii)(D) proceeding. (Standard Drywall's Cross-Exceptions at ¶ 3.) Standard Drywall's contentions are contrary to the structure of the Act, the Board's regulations and common sense.²

The Board's Rules and Regulations provide that "[i]f, after issuance of the determination by the Board, the parties submit to the Regional Director satisfactory evidence that they have complied with the determination, the Regional Director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the Regional Director shall proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the Act[.]" 29 C.F.R. § 102.91. If one of the parties is alleged not comply with the 10(k) award, "[t]he record of the proceeding

² Standard Drywall's cross-exception to the Board's interlocutory order belies Standard Drywall's contention in its answering brief that the interlocutory order is the "law of the case" and may not be revisited. *See* Standard Drywall's Answering Br., at 22. As set forth in Local 200's Reply to the General Counsel's Answering Brief, the Board may reconsider its ruling on interlocutory orders in its final decision and order. *See, e.g., Highland Yarn Mills, Inc.*, 315 NLRB 1169, 1169 n. 3 (1994); *Serv-U Stores, Inc.*, 234 NLRB 1143, 1143 (1978).

under section 10(k) and the determination of the Board thereon *shall become a part of the record* in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the Act.” 29 C.F.R. § 102.92 (emphasis added); *see also Int’l Tel. & Telegraph Corp. v. Local 134, IBEW*, 419 U.S. 428, 446 (1975) (in section 8(b)(4)(D) proceeding, “[t]he same issues [as in the 10(k) proceeding] will generally be relevant, [and] the record of the earlier proceeding *will be admitted* in the later one”) (emphasis added); *Local 3, IBEW (New York Tel. Co.)*, 197 NLRB 866, 866-67 n.5 (1972).

As the Board’s Regulations make clear, the purpose of requiring that the full record of the underlying 10(k) proceedings be made part of the record in the 8(b)(4)(ii)(D) proceeding is so that the 10(k) decision may be “subject to judicial review . . . in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the Act.” 29 C.F.R. § 102.92. The only means of obtaining judicial review of a 10(k) award is on petition to review the final order of the Board in the 8(b)(4)(ii)(D) proceeding. *NLRB v. Plasterers Local 79*, 404 U.S. 116, 126 (1971). Regardless of whether the Board finds Respondents to have violated Section 8(b)(4)(ii)(D) or not, Respondents will have the opportunity to seek review of the 10(k) awards in *SDI-I* and *SDI-II* in any petition to enforce or review the Board’s final order. Standard Drywall seeks to prevent there from being a record on which such review could be based.

Standard Drywall argues that the record in the 10(k) proceedings should not have been made part of the record in this 8(b)(4)(ii)(D) proceeding because the Respondent in the *SDI-I* and *SDI-II* 10(k) proceedings was Standard Drywall’s favored union, the Carpenters and not Respondents. (*See* Standard Drywall’s Answering Brief at 28.) This argument is quite clearly without merit.

Standard Drywall misstates the basic structure of the Act, contending that under the Act, “[i]f the *charged union* loses the section 10(k) determination, the charge will be dismissed if the parties submit to the Regional Director’s [sic] satisfactory evidence that the charged union has complied with the award. If, however, the *charged union* does not agree to comply with the award, an 8(b)(4)(D) complaint issues.” (Standard Drywall’s Answering Br., at 27 (emphasis added).) But as this case proves, it is not solely the “charged union” in the underlying 10(k) proceeding that can be held to violate 8(b)(4)(ii)(D) if it does not comply with the 10(k) award. Rather, any of the “parties” to the 10(k) proceeding can be the subject of an 8(b)(4)(ii)(D) complaint. *See* 29 C.F.R. § 102.91.

The plain language of Regulation 102.92 contains no exception to the rule that the record in the 10(k) proceeding becomes part of the record in any subsequent 8(b)(4)(ii)(D) proceeding that is based upon such 10(k) proceeding. The 8(b)(4)(ii)(D) complaint against Respondents is based upon their allegedly having violated the 10(k) awards in *SDI-I* and *SDI-II*. Under Standard Drywall’s reasoning, an entire category of 10(k) proceedings would become essentially unreviewable, contrary to both the structure of the Act and the clear purpose of Regulation 102.92. Unsurprisingly, Standard Drywall is unable to find any Board authority for its position.

Standard Drywall’s Exceptions 2 and 3 are without any merit.

B. Exception 4: The ALJ Found Only One Cause of Action in the Pullen Lawsuit to Be “Coercive”

Standard Drywall excepts to the ALJ’s failure to find that the first cause of action in the *Pullen* lawsuit “coerced” Standard Drywall in violation of Section 8(b)(4)(ii)(D). (Standard Drywall’s Cross-Exceptions, ¶ 4.) Standard Drywall argues that “Respondents are wrong they [sic] claim the ALJ did not find the continued prosecution of the first cause of action to violate

section 8(b)(4)(ii)(D).” (*Id.*) However, Standard Drywall excepts to the extent that the ALJ did not find the entire *Pullen* lawsuit to violate Section 8(b)(4)(ii)(D).

Standard Drywall is correct in surmising that the ALJ did not find the entire *Pullen* lawsuit to violate Section 8(b)(4)(ii)(D).

The Second Amended Complaint in the *Pullen* lawsuit contains five causes of action. (*SDI III*, GC Exh. 19.) The lawsuit’s first cause of action was brought under California’s prevailing wage law by former Standard Drywall employees and alleges that SDI has underpaid its journeyman workers on California public works projects. (*Id.*, at ¶¶ 17-27.) A second cause of action alleges that SDI has failed to maintain accurate payroll records for its California public works projects. (*Id.* at ¶¶ 28-35.) The third cause of action alleges that Standard Drywall violated California Labor Code § 1777.5(d), which requires public works contractors to employ apprentices from state-approved programs according to state-mandated ratios. (*Id.*, ¶¶ 37-43.)³ In the fourth and fifth causes of action, former employees of Standard Drywall and Local 200 seek restitution to the responsible state agency of apprentice training contributions that Standard Drywall failed to make on behalf of its journeyman workers. (*Id.* at ¶¶ 44-50, 51-56.)

The ALJ made no findings on whether the first, second, fourth or fifth causes of action of the Second Amended Complaint violated Section 8(b)(4)(ii)(D). The ALJ only made recommended findings regarding the third cause of action – Standard Drywall’s failure to hire state-registered apprentices in the ratios mandated by California Labor Code section 1777.5(d). (ALJD at 8-11.) The ALJ’s recommended findings makes clear that the ALJ only addressed the third cause of action:

³ The third cause of action was designated as the fifth cause of action in the *Pullen* lawsuit’s original Complaint. (*SDI-II*, GC Exh. 2.)

The Pullen Lawsuit, as originally filed, in the 5th Cause of Action alleges that under California Labor Code section 1777.5 SDI was required to hire Plasterers apprentices and failed to do so. The amended Pullen lawsuit alleges that the only apprenticeship program SDI could hire apprentices from was the Plasterers program. Finally, the Second Amended Pullen Lawsuit filed after the Board's 10(k) awards herein seeks lost wages and benefits for Local 200 apprentices SDI failed to hire from October 29, 2000 to the present had it complied with Labor Code Section 1777.5.

(ALJD at 10.) ALJ's decision does not discuss any of the other causes of action in the *Pullen* lawsuit or make any recommended findings that could support a proposed remedy ordering Local 200 to cease and desist from pursuing such other causes of action. (See Local 200's Brief in Support of Exceptions at 47-48.)

Standard Drywall's exception to the ALJ's failure to find that the first cause of action in the *Pullen* lawsuit violates Section 8(b)(4)(ii)(D) is baseless.

The first cause of action alleges that SDI has violated California Labor Code § 1777.5(c),⁴ which provides that employers on public works projects may only pay a lower apprentice prevailing wage rate (rather than the journeyman rate) to apprentices who are registered with state-approved training programs. (*SDI III*, GC Exh. 19, ¶¶ 17-27.) Other workers must be paid journeyman wages. Jose Deleon and David Diaz, two former employees of Standard Drywall who were paid the lower apprentice rate but who were not registered apprentices at the time, brought this cause of action.

The first cause of action simply requires Standard Drywall to comply with state law by paying its own, Carpenters-represented plasterers at the proper wage rates and to reimburse its

⁴ California Labor Code § 1777.5(c) provides: "Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements . . . are eligible to be employed at the apprentice wage rate on public works." The Supreme Court upheld the validity of Labor Code § 1777.5(c) in *California Div. of Labor Standards v. Dillingham Constr. N.A.*, 519 U.S. 316, 330 (1997).

current and former employees for underpaid wages. This cause of action poses no jurisdictional threat to Standard Drywall whatsoever and does not conflict with any 10(k) award. The first cause of action cannot violate section 8(b)(4)(ii)(D). *Iron Workers Local 46 (AFC Enters.)*, 316 NLRB 271 (1995) (no dispute over assignment of work where picketing relates only to the terms and conditions under which the work is performed rather than to which employees will perform the work).

Standard Drywall's contention that "the first cause of action is premised on SDI's failure to use apprentices from Local 200's apprenticeship program" is simply false. The first cause of action is premised on Standard Drywall's paying its own employees at apprenticeship (rather than journeyman) rates when those employees were not apprentices within the meaning of California Labor Code section 1777.5(c). It does not seek to require Standard Drywall to hire anyone – it simply demands that Standard Drywall pay its employees consistent with State law. Under no conceivable rationale can a lawsuit brought by Standard Drywall's former employees alleging that they were underpaid in violation of California law constitute a demand that Standard Drywall "assign particular work to employees in a particular labor organization[.]" Section 8(b)(4)(ii)(D), 29 U.S.C. § 158(b)(4)(ii)(D).

C. **Exceptions 5, 6 & 7: Standard Drywall Failed to Establish it is Entitled to a Broad Remedial Order**

Standard Drywall devotes three exceptions to the ALJ's recommended remedy and order. In these exceptions, the Charging Party challenges the ALJ's remedy, order and notice to the extent that the ALJ did not "impose a broad order" upon the OPCMIA and Local 200. The ALJ recommended a cease and desist order that would prohibit the OPCMIA and Local 200 from "in any manner threatening to and actually seeking" to enforce the Kelly and Greenberg awards and/or to file a complaint with the Plan with the object of forcing Standard Drywall to assign the

disputed work to employees represented by Local 200 rather than the Carpenters. (ALJD at 14, lns. 41-44 & ALJD at 15, lns. 1-2; ALJD at 15, lns. 36-40.) The ALJ further recommended an order that would prohibit Local 200 from “in any manner maintaining, subsequent to the Board’s Section 10(k) determination in *SDI II*, the Pullen and Tortious Lawsuits” with the objective of forcing Standard Drywall to assign the disputed work to employees represented by Local 200 rather than the Carpenters. (ALJD at 15, lns. 42-45.)

The Charging Party wants a broader cease and desist order, one that would prohibit the OPCMIA and Local 200 from, in Standard Drywall’s words, “in any manner threatening, coercing, or restraining [Standard Drywall] with an object of forcing or requiring [Standard Drywall] to assign the disputed work to members of or employees represented by Respondent Local 200 rather than to members of or employees represented by the Carpenters.” (Standard Drywall’s Exceptions ¶ 6.) The *sole* basis for a broad order is the “flagrant and intentional violations of Section 8(b)(4)(D).” (Standard Drywall’s Answering Brief at 45.)

The Board has held that a broad order—*i.e.*, an order requiring a respondent to cease and desist from threatening, restraining or coercing the charging party in any other manner—“is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees’ fundamental statutory rights.” *Hickmontt Foods, Inc.*, 242 NLRB 1357 (1979). The Board examines “the nature and extent of the violations committed by a respondent” when crafting an appropriate order. *Id.* at 1357.

Given the Charging Party is seeking a broad order, it bears the burden of proving that such an order is appropriate given the facts of this case. Standard Drywall argues, “[t]his is the third time the Board has involved itself in the jurisdictional dispute” between the Carpenters and

Local 200. (Standard Drywall's Answering Brief at 2.) However, the first and second time the Board addressed the jurisdictional dispute, it did so based upon the use of proscribed means (*i.e.*, the threat of striking) by the *Carpenters*, not Local 200 or the OPCMIA. *See Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 346 NLRB 478, 481 (2006) (noting threat to strike by Carpenters). *See also Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 348 NLRB No. 87, slip op. at 4-5 (2007) (discussing threat to strike by Carpenters). This case represents the first instance in which the Board is called upon to adjudicate the alleged coercive activity of Local 200 and/or the OPCMIA. Standard Drywall has not cited to any prior decisions in which either Local 200 or the OPCMIA has been found to have violated Section 8(b)(4)(ii)(D). The absence of prior cases precludes a finding that either Respondent has a "proclivity to violate the Act." Consequently, the standard in *Hickmontt Foods* is not satisfied. *See Polaroid Corp.*, 329 NLRB 424, 436 & n.34 (1999) (finding standard not satisfied where, *inter alia*, charging party has not cited prior decision finding respondent violated the Act).

Furthermore, Standard Drywall's cursory claim that the Respondents have engaged in "flagrant and intentional violations of Section 8(b)(4)(ii)(D)" is insufficient to establish that either the OPCMIA or Local 200 has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard" for the Act. *Hickmontt Foods, Inc.*, 242 NLRB at 1357. The evidence has established that the OPCMIA and Local 200 are no longer proceeding before the Plan. *See Teamsters Local 315 (Atchison, Topeka & Santa Fe Railway Co.)*, 306 NLRB 616 & n.3 (1992) (finding broad order not warranted where respondent ceased coercive activity—unlawful picketing and handbilling—and no prior violations), *enforced*, 20 F.3d 1017 (9th Cir. 1994); *Iron Workers Pac. NW Council (Hoffman Constr.)*, 292 NLRB 562, 563 (1989) (finding

broad order inappropriate where no evidence that respondent continued picketing despite finding of prior violation), *enforced*, 913 F.2d 1470 (9th Cir. 1990).

Moreover, even if the Board were to find that Local 200 has violated Section 8(b)(4)(ii)(D) by pursuing the *Pullen* and Tortious Interference lawsuits, it would be making new law in so holding. No Board or court decision has ever found that a union violates Section 8(b)(4)(ii)(D) by pursuing a lawsuit under state prevailing wage law (like the *Pullen* lawsuit) or a lawsuit seeking to hold the employer accountable for violations of the anti-kickback provisions of the Davis-Bacon Act and Copeland Anti-Kickback Act (like the Tortious Interference Lawsuit). Under such circumstances, Local 200's decision to pursue these lawsuits cannot be characterized as "egregious misconduct."

Therefore, the OPCMIA and Local 200 respectfully submit that Standard Drywall has failed to establish that it is entitled to a broad order. The Board should deny Exceptions 5, 6 and 7 in their entirety.

D. Exception 8: Standard Drywall is Not Entitled to Interest on Attorney's Fees

The Respondents further submit, for the reasons set forth in the briefs in support of their respective exceptions, Standard Drywall is not entitled to any remedy or order because there has been no violation of the Act in this case. Given there has been no violation, there is no basis to award attorney's fees and costs, and, in turn, no basis to award interest on such fees and costs. Thus, the Board should deny Exception No. 8.

II. CONCLUSION

Accordingly, for the foregoing reasons, the OPCMIA and Local 200 respectfully request that the Board deny Standard Drywall's cross-exceptions.

Respectfully submitted,

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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 "Joint Answering Brief of Respondents Operative Plasterers' & Cement Masons' International Association and Operative Plasterers' & Cement Masons' International Association, Local 200, AFL-CIO to the Answering Brief filed by Standard Drywall, Inc." was served by United Parcel Service, overnight mail, on the following:

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