

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**UNITED UNION OF ROOFERS, WATERPROOFERS,
AND ALLIED WORKERS, LOCAL 162**

and

**Case 28-CB-080496
28-CB-085690**

A.W. FARRELL & SON, INC.

A.W. FARRELL & SON, INC.

and

Case 28-CA-085434

**UNITED UNION OF ROOFERS, WATERPROOFERS,
AND ALLIED WORKERS, LOCAL 162**

and

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, AFL-CIO, LOCAL UNION NO. 88
Party in Interest**

REPLY TO ROOFER'S LOCAL 162'S ANSWERING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION. 1

II. AWF HAS A VALID CBA WITH SMWIA LOCAL 88 UNDER WHICH IT
ASSIGNS WORK TO LOCAL 88. 2

III. ROOFERS LOCAL 162 FAILED AND REFUSED TO BARGAIN IN GOOD
FAITH. 4

IV. CONCLUSION. 5

TABLE OF AUTHORITIES

CASES

Beacon Sales Acquisition, Inc.,
357 NLRB No. 75 (2011) 4

Bricklayers, Masons & Plasterers’ Int’l Union of Am., Local No. 1
(Lembke Construction), 194 NLRB 649 (1971) 2

Chicago and Northeast Ill. District Council of Carpenters (Prate Installation),
341 NLRB No. 73 (2004) 2

Glaziers Dist. Council 16 (MALV Inc. dba Service West),
356 NLRB No. 105 (2011) 3

Int’l Brotherhood of Teamsters Local 107 (Reber-Friel Co.),
336 NLRB 518 (2001) 2

Laborers Int’l Union of N. Am., Local 113 (Super Excavators, Inc.),
327 NLRB 113 (1998) 2

Laborers Int’l Union of N. Am., Local 1184 (High Light Electric),
355 NLRB No. 29 (2010) 2

Pacific Crane Maintenance,
359 NLRB No. 136 (2013) 3

Plumbers Local 457 (Bomat Plumbing & Heating),
131 NLRB 1243 (1961), enf’d. 299 F.2d 497 (2d Cir. 1962)..... 4

I. INTRODUCTION.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), A.W. Farrell & Son, Inc. (“AWF” or “Employer”) hereby submits this Reply Brief to the Answering Brief filed by the United Union of Roofers, Waterproofers, and Allied Workers, Local 162 (“Roofers Local 162” or “Local 162”).¹

AWF has been caught in the middle of a jurisdictional dispute between the Roofers Local 162 and the Sheet Metal Workers International Association Local 88 (“SMWIA Local 88” or “Local 88”) for over four years now. Roofers Local 162 would like to frame the issues as representational, when it is in fact a standard jurisdictional dispute. Both the Roofers Local 162 and SMWIA Local 88 claim jurisdictions over roofing, while SMWIA Local 88’s claims extend to metal siding, decking, and other metal work as well.

The jurisdiction of the bargaining unit represented by SMWIA Local 88 overlaps with the jurisdiction of the bargaining unit represented by Roofers Local 162. SMWIA Local 88-covered employees, however, also include workers who perform more extensive sheet metal work, including the siding work performed by AWF, a fact that Roofers Local 162 has continually failed to acknowledge. A hearing was held on June 13, 2012, with Roofers Local 162, SMWIA Local 88, and AWF pursuant to Section 10(k) of the National Labor Relations Act to decide this jurisdictional dispute, and that forum is the proper place to resolve the claims of Roofers Local 162 and SMWIA Local 88.

¹ On July 11, 2013, the National Labor Relations Board issued its decision in *A.W. Farrell & Son, Inc.*, 28-CA-023502, 28-CA-060627, and 28-CA-062301, in which it confirmed that Roofers Local 162 is the 9(a) representative of a certain unit of A.W.F. employees and that AWF and Roofers Local 162 did reach agreement on a successor collective bargaining agreement for August 2010-2012. 359 NLRB No. 154 (2013). AWF has filed a Petition for Review with the United States Circuit Court of Appeals for the D.C. Circuit on July 19, 2013, based in part on the invalidity of the Board Decisions and based in part on the error in the Board’s decision. The Board decision should not be considered collateral estoppel, as it is invalid. Nonetheless, the decision does not impact the jurisdictional issues in this case.

Roofers Local 162's Answering Brief fails entirely to address AWF's exceptions to the Administrative Law Judge Ringler's decision ("Ringler Dec.") that Roofers Local 162 was excused from bargaining in good faith. Therefore, the Board should accept AWF's exceptions and find that Roofers Local 162 failed to bargain in good faith.

II. AWF HAS A VALID CBA WITH SMWIA LOCAL 88 UNDER WHICH IT ASSIGNS WORK TO LOCAL 88.

Roofers Local 162's Answering Brief is based almost exclusively on the argument that AWF did not have the right to sign a collective bargaining agreement with SMWIA Local 88. It is not uncommon for a construction contractor to have collective bargaining agreements with two unions with overlapping jurisdiction. *See, e.g., Chicago and Northeast Ill. District Council of Carpenters (Prate Installation)*, 341 NLRB No. 73 (2004) (employer had CBA with Carpenters and Roofers that both covered certain aspects of roofing); *Int'l Brotherhood of Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518 (2001) (employer had CBAs with Carpenters, Teamsters, and Laborers); *Bricklayers, Masons & Plasterers' Int'l Union of Am., Local No. 1 (Lembke Construction)*, 194 NLRB 649 (1971) (employer, as members of multi-employer bargaining unit, had CBAs both the Carpenters and the Bricklayers); *Laborers Int'l Union of N. Am., Local 1184 (High Light Electric)* 355 NLRB No. 29 (2010) (employer had CBAs with Laborers and Electricians); *Laborers Int'l Union of N. Am., Local 113 (Super Excavators, Inc.)*, 327 NLRB 113 (1998) (employer had CBAs with the Laborers and the Operating Engineers). If the jurisdiction and claims of the unions did not overlap, there would be no need for Section 10(k) of the National Labor Relations Act.

ALJ Ringler erred in finding that AWF had violated its duty to bargain and had failed to recognize Roofers Local 162 by assigning work to SMWIA Local 88. The fact that one union has Section 9(a) status does not immediately mean that an issue is representational rather than jurisdictional. *See, e.g., Laborers Int'l Union of N. Am., Local 1184 (High Light Electric, Inc.)*,

355 NLRB No. 29 n. 8 (2010) (proceeding with 10(k) hearing despite one union having Section 9(a) status — “The change in Local 1184's representative status has no effect on our determination of the merits of the dispute.”); *Glaziers Dist. Council 16 (MALV Inc. dba Service West)*, 356 NLRB No. 105 n. 11 (2011) (same). Roofers Local 162's 9(a) status does not preclude valid agreements with SMWIA Local 88 which overlap with the Local 162 agreements but cover more and different work as well.

In Case 28-CA-23502, ALJ Parke was aware of the collective bargaining agreements between AWF and SMWIA Local 88 when she ordered AWF to bargain with Local 162. [Exh. 119]. The ALJ did not order AWF to discontinue its collective bargaining agreement with SMWIA Local 88 or discontinue assigning work to Local 88. [JTX 96, Bates 0540-0552]. ALJ Parke appropriately recognized that an employer may have collective bargaining agreements with more than one union. The Board should do the same and find that Roofers Local 162 failed and refused to bargain in good faith.

Pacific Crane Maintenance, cited by Roofers Local 162 in its Answering Brief, is inapposite and does not lead to the conclusion that AWF cannot have collective bargaining agreements with both Roofers Local 162 and SMWIA Local 88. In *Pacific Crane Maintenance*, the employer had a bargaining agreement with the Machinists. 359 NLRB No. 136 (2013). The employer then terminated all the employees, and a related employer, who had a collective bargaining agreement with the ILWU, hired the employees and placed them within the ILWU bargaining unit. The question before the Board was whether the employees who had been represented by the Machinists maintained a sufficient separate identity after the transfer to the related employer in order to continue to be represented by the Machinists rather than being merged into the ILWU unit. *Id.* The Board was not addressing and did not address a situation, such as the one in the present case, in which the employer had two unions both claiming

jurisdiction of the same work and the employer assigned the work to one of the unions. *Pacific Crane Maintenance*, and the remedy in *Pacific Crane Maintenance*, is not applicable in this case.

III. ROOFERS LOCAL 162 FAILED AND REFUSED TO BARGAIN IN GOOD FAITH.

Roofers Local 162's Answering Brief fails entirely to address AWF's exceptions to ALJ Ringler's decision that Roofers Local 162 was excused from bargaining in good faith, except to note with no support that "it scheduled meetings, requested information and met." [Local 162 Answering Brief, p. 3, ll. 21-23]. The record before ALJ Ringler clearly establishes bad faith bargaining by Roofers Local 162. Judge Ringler found that Local 162 had committed many acts that are bad-faith bargaining, including unreasonably delaying bargaining sessions, cancelling bargaining sessions, verbally abusing AWF's bargaining representative, and failing to schedule additional bargaining. [Ringler Dec. 14:18-23].

Because Roofers Local 162 engaged in wrongful conduct that amounts to bad-faith bargaining, the Board should not adopt the decision of ALJ Ringler that Roofers Local 162's actions were excused by the actions of AWF. One wrong does not excuse another, and even assuming unlawful conduct by AWF, Roofers Local 162's duty to meet and bargain in good faith remains. *Beacon Sales Acquisition, Inc.*, 357 NLRB No. 75 (Aug. 26, 2011); *Plumbers Local 457 (Bomat Plumbing & Heating)*, 131 NLRB 1243, 1246 (1961), enf'd. 299 F.2d 497 (2d Cir. 1962).

Roofers Local 162 also argued that because AWF and Local 162 had reached an agreement for 2010-2012 it did not have a duty to bargain until July 2012. The Board recently found that AWF and Roofers Local 162 did have a CBA for 2010-2012 [359 NLRB No. 154 (2013)]. AWF has filed a Petition for Review with the U.S. Circuit Court of Appeals for the D.C. Circuit. Roofers Local 162's bad actions were not limited, however, to the period before the alleged 2010-2012 agreement expired and also related to negotiations for an agreement to

replace the alleged 2010-2012 agreement. Therefore, the Board should find that Roofers Local 162 failed and refused to bargain in good faith.

IV. CONCLUSION.

At heart, this is a jurisdictional dispute. Many of the issues will be decided when the Board decides the 10(k) case between AWF, Roofers Local 162, and SMWIA Local 88. The proper remedies will be easier to determine after the jurisdictional issue is resolved. An employer can validly have agreements with two unions with overlapping jurisdictional claims.

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CERTIFICATE OF SERVICE

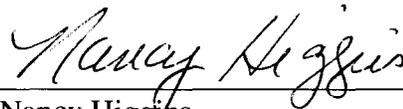
The undersigned hereby certifies that a true and correct copy of the foregoing Reply to Roofers Local 162's Answering Brief was filed electronically via E-Gov with the National Labor Relations Board Office of Executive Secretary on July 25, 2013 with copy by electronic mail to:

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