

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

SOUTHWEST REGIONAL COUNCIL
OF CARPENTERS,

Charged party,

Case No. 32-CD-251616

and

BRANDSAFWAY SERVICES, LLC

Employer,

LABORERS INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL 169,

Involved party.

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**LABORERS LOCAL 169'S REPLY TO OPPOSITIONS FOR
EXTENSION OF TIME TO FILE BRIEF**

COMES NOW Laborers Local 169, by and through its undersigned attorney, and hereby files its Reply to the Oppositions of Carpenters and Brandsafway to Local 169's Motion For Extension of Time To File Brief.

Both the Employer and the Charged party argue "The Laborers' Motion, filed on February 25, 2020, is filed within 3 days of the February 28 due date for briefs. Applicable Board Rules provide, "Requests for extensions of time filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance." Section 102.2(c), NLRB Rules and Regulations." Laborers Local 169 disagrees for the following reasons:

1. Although they claim briefs are scheduled due on Friday, February 28, 2020, it is and was Local 169's understanding and belief that, based on the transcript, pages 157-158, that the briefs would be due on March 3, 2020, based on what was stated to each of the parties at the end of the hearing, and the lack of objection from either the counsel for the Employer or counsel for the Carpenters.¹ Specifically, as recorded on pages 157-158, the following record appears:

HEARING OFFICER HAJDUK: All right. Wonderful. And we've already talked about the parties don't want to orally argue this on the record, so what I'm going to do is I'm going to read the following closing statement into the record right now.

Should any party desire to file a brief with the Board in this case, such brief must be printed and otherwise legibly duplicated, double spaced on 8-and-1/2-by-11-inch paper. An original plus seven copies must be filed with the Board in Washington within seven days after the close of this hearing. That would be seven days after noon on the 21st. So go forward 158 from that. I believe that would be March 3rd. A copy must also be served on each of the other parties, and proof of such service must be filed with the Board at the time the briefs are filed. Any request for an extension of time must be made of the board through the executive secretary in Washington, D.C., not later than three days before the date the briefs are due. Such requests must be made in writing, and copies must be served immediately on each of the parties.

Is there anything further for the hearing today?

MR. LANGTON: No.

MS. KANG [SHANLEY]: No.

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. The undersigned intends no criticism of Hearing Officer Hjaduk as he undersigned believes he was performing his duty as directed.

MR. KAMIN: No.

HEARING OFFICER HAJDUK: All right. The hearing is now in adjournment until it's finally closed on Friday, February 21st. Thank you very much. (Emphasis added.)

The failure of either counsel for the Employer or Carpenters to correct or otherwise question the Hearing Officer must be considered acquiesce or waiver concerning the date briefs are due, especially since they now argue the Hearing Officer was incorrect when he stated "March 3rd," as noted above.

2. Moreover, on Friday, February 21st and again on Monday, February 24th, counsel for Laborers Local 169 tried to contact Board Agent Alex Hajduk who ran the hearing held February 18th, 2020, to ascertain whether he had filed the hearing report and the actual date the briefs would be due. Said counsel was unable to contact him, however, he subsequently learned Mr. Hajduk had an emergency which required his immediate attention away from work. Counsel for Laborers Local 169 also checked the Board's website multiple times to see if the Hearing Report had been filed. Counsel for Laborers Local 169 was unable to find it on the website, even though he saw other documents filed by Region 32 in this matter.

On Monday, February 24, 2020, both Counsel for Laborers Local 169 and his secretary tried multiple times to file the Motion For Extension electronically on the NLRB website. However, each of the approximately six times when they tried to sign in using the Account Number Counsel for Laborers Local 169 was given, i.e., 1-

320519-4218, they received a rejection message that the number was "too long." Counsel for Laborers Local 169 had his secretary attempt to call the Washington, D.C., NLRB office before 5:00 p.m., EST, on February 24, 2020, in an attempt to talk to someone that could help, but she was only able to leave a message and did not get a return call. On Tuesday, February 25, 2020, Counsel for Laborers Local 169 was able to talk to a Region 32 representative, Steve Sloper, to discuss the problem. Mr. Sloper suggested I file as a "Guest," which is what Counsel for Laborers Local 169 did.

Accordingly, it is respectfully submitted the multiple attempts on counsel for Laborers Local 169 and his secretary on February 24th to file the Motion For Extension of Time, but for the technical problem with the electronic system, would have been timely, even if the date for filing briefs is determined to be February 28th.

3. Opposing parties also argue

The Laborers' Motion is not "grounded upon circumstances not reasonable foreseeable in advance," as the alleged conflict - a vacation - is described as pre-planned and pre-paid in the Laborers' Motion, and Attorney Langton referenced this vacation on the record at hearing. (Tr. 155). The purported grounds for the Motion were known to Attorney Langton long before the filing of this Motion, and clearly were reasonably foreseeable before February 25, 2020. The Laborers simply failed to file a Motion in a timely fashion. The Motion should be denied on that basis, under Board Rules.

It is true Mr. Langton stated on February 18, 2020:

I will be on vacation from February 26th through March 7th. I'll be back in the office on March 9th, so I'd

respectfully request that the Board allow me seven days after I return, because I assume I'll have the transcript by then to file the brief. **And for that matter, I think that all parties should have the same courtesy for the date.** (Emphasis added.)

It is also true NEITHER COUNSEL OBJECTED TO THE REQUEST!

Obviously, it is only after the motion was filed that opposing counsel decided to object believing they had a "gotcha" moment. If they truly believed what they are now arguing, they had a duty to speak up at the hearing and not later when they felt they would have Laborer Local 169's counsel at a complete disadvantage, knowing he would be away from his office and staff.

4. The opposing counsel also argue "the Motion should be denied on its lack of merit," because, even though the hearing record was held open until February 21, 2020, the live hearing ended on February 18, 2020, and therefore Mr. Langton should have apparently been psychic enough to know they would object to an extension of time, even though they never so stated on the record, and he should have known that when trying to file the Motion on Monday, February 24th, there would be a technical glitch and, therefore - according to them - he should have dropped all pending matters and drafted the post hearing brief. Such argument is beyond the pale of reason and without merit.

Moreover, the fact that Mr. Kamin, who is a partner in a rather large law firm, could "submit a timely posthearing brief in this matter on February 28, 2020, despite [his] scheduled

vacation," is not legitimate grounds for denying Laborers Local 169's Motion For Extension of Time to file its brief.

5. In the Employer's final argument it contends Laborers Local 169 has misrepresented that "there is no urgency in this matter because the disputed work is completed," because "The Laborers are actively pursuing a directly related grievance against BSS that was [sic] set for hearing on March 17, 2020." However, as the counsel clearly knows, and the record reflects, the grievance referred to was filed long before the charge was filed, and therefore was not, and is not illegal, nor an issue in this proceeding. In so arguing, Employer's counsel is ignoring the fact, or intentionally misleading the Board, as he knows very well the grievance is not directly related to the work at issue, but was filed in order to establish the existence or non-existence of a collective bargaining agreement between Laborers Local 169 and Brandsafway Services, LLC.

In Capitol Drilling Supplies, 318 NLRB 809, 810 (1995), In the construction industry, a union's action through a grievance procedure, arbitration, or judicial process to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause does not constitute a claim to the subcontractor for the work provided the union does not, so to speak, enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such

actions.”

In *Georgia Pacific*, 291 NLRB 89, 92 (1988), a union had filed a grievance subsequent to the 10(k) hearing, but before the issuance of the Board’s Decision and Determination of Dispute. In deciding the case, the Board cited *Carey v. Westinghouse Corp*, 375 U.S. 261 (1964), to wit:

[I]n *Carey v Westinghouse Corp*, 375 U S 261 (1964), the Supreme Court spelled out in no uncertain terms its view that the grievance arbitration process has a major role to play in settling jurisdictional disputes. The Court held in *Carey* that prior to a Board 10(k) award a union involved in a jurisdictional dispute may file a contractual grievance pursue it to arbitration and seek to enforce an arbitration award under Section 301. The Court stated that the underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process that [g]rievance arbitration is [a common] method of settling disputes over work assignments and that [s]ince § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions we conclude that grievance procedures pursued to arbitration further the policies of the Act 375 U S at 265-266.

Continuing, the Georgia Pacific Board held, at page 93:

Thus, we find that the Respondent’s grievances filed before the 10(k) determination do not constitute coercion because the grievances were arguably meritorious. Indeed, an arbitrator found that the grievances were in fact meritorious. Further we do not center the analysis on the right of control question right of control is simply a factor that may be relevant in determining whether the grievance is arguably meritorious.

In sum, we modify the Board s original Decision and Order and dismiss the complaint insofar as it alleges that the filing of grievances before the 10(k) determination issued violated the Act.

Lastly, the Employer claims, without any evidence whatsoever,

Laborers are somehow "purs[ing] "behind-the-scenes stalking of work and its demands for assignment of the work in an alternative forum, while the Board proceeding is delayed." It is respectfully submitted such speculative sophistry is totally "without merit. Assuming aguendo a member of Laborers is the person in the picture the Employer relies upon for such sophistry, it is not illegal for a union to "police" jobs in the area, as the Carpenters have done in the past.

Accordingly, it is respectfully submitted there is no real urgency to this matter such that any party will be adversely affected by a short extension of time to file a post hearing brief.

Therefore, for any or all of the reasons stated hereinabove, it is respectfully submitted the Oppositions are without merit, and the Motion To Extend Time To file a brief should be granted.

DATED this 26th day of February, 2020.

/s/ Michael E. Langton
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has served a copy of the foregoing REPLY TO OPPOSITION FOR MOTION FOR EXTENSION OF TIME TO FILE BRIEF, by electronic mail upon:

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DATED THIS 27th DAY OF FEBRUARY, 2020

/s/ Michael E. Langton, Esq.
MICHAEL E. LANGTON, Esq.