

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHWEST REGIONAL COUNCIL OF  
CARPENTERS,

Charged Party,

and

Case 32-CD-251616

BRANDSAFWAY SERVICES, LLC,

Employer,

and

LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 169,

Involved Party.

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POST HEARING BRIEF OF INVOLVED PARTY  
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 169

COMES NOW LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 169, (hereinafter "Laborers"), by and through its undersigned attorney and hereby files its Post Hearing Brief in the above-referenced matter.

I.

BACKGROUND AND STATEMENT OF THE CASE

On August 1, 2019, Laborers filed a grievance against "Brandsafway Services" and "Brand Energy Services," Attention Matt

Headrick (Ex. E-1),<sup>1</sup> "over the failure of Brand to comply with the LMA [Laborers Master Agreement]." The grievance stated in part the Union "recently observed workers employed by Brandsafway/Brand Energy Services successor (Brand) performing work, covered by the Laborers Master Agreement (LMA) in effect between the Union and Brand on the Aloft Hotel project in Reno, ... ."

By letter dated August 6, 2019, the Assistant General Counsel for "Brand Industrial Services, LLC," responded to the August 1, 2019 grievance. (Ex. L-2, Exhibit 10.) Said counsel contended within the August 6, 2019 letter "Because there is no contract in place, BSS [BrandSafway Services LLC] is not subject to the grievance and arbitration procedures in the Local 169 collective bargaining agreement. ... Notwithstanding the above, BrandSafway is willing to sit down and discuss this matter with the Union in more detail."

On September 9, 2019, a representative of Carpenters sent a letter to Matt Headrick, "BrandSafway Services," (C-1), stating, in relevant part: "Carpenters understand that the Laborers Union are demanding that you assign the scaffolding work in Northern Nevada, currently assigned to the Southwest Regional Council Of Carpenters, to them. ¶ This would not only violate your agreement with the

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At the hearing held February 18, 2020 exhibits submitted by Laborers were identified as "L-\_\_;" Exhibits submitted by Carpenters were identified as "C-\_\_;" and exhibits submitted by the employer identified as "E-\_\_." All references hereinafter to exhibits will be identified in the same manner.

Carpenters, it would also result in Carpenters striking and picketing all your jobs."

On September 10, 2019, representatives of Laborers and BrandSafway Services LLC, (sometimes referred to hereafter as "BSS"), met and discussed their various positions as to whether a CBA existed between Laborers and BSS. They also had follow-up telephonic discussions concerning the issue of whether BSS was bound to a CBA with Laborers.

On October 1, 2019, Laborers sent a letter addressed to three entities: "Brand Industrial Services," and "Brand Energy Services," and "Brandsafway Services." (Ex. L-2, Exhibit 19.) Within the letter Business Manager Daly referenced the September 10<sup>th</sup> meeting and the September 27<sup>th</sup> conference call and stated, in relevant part:

At the September 10, 2019 meeting with Matt Headrick it was conveyed to the Union that Brandsafway Industries LLC (formerly known as Brand Energy Services and Brand Scaffold Rental and Erection) was not the Brand entity that was performing the work at the Aloft Hotel project in Reno NV. ...

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In light of the new and/or clarifying information the Union will continue to hold the August 1, 2019 grievance in abeyance pending a determination as to whether there is a dispute that Brandsafway Industries LLC is bound to the LMA. If it is determined that Brandsafway Industries LLC is bound to the LMA then the August 1, 2019 grievance will be withdrawn. If there is a dispute as to whether Brandsafway Industries LLC is bound to the LMA the Union will amend the grievance to address that issue first.

In regard to Brandsafway Services LLC (formerly known as Safway Services LLC) as previously stated it is the Union's unequivocal position that Brandsafway Services

LLC is bound to the LMA and that the June 1, 2018 letter from Brand Industrial Services LLC declining to recognize or bargain with the Union was not a proper or timely notice of termination pursuant to the terms of the LMA.

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Accordingly, in a separate letter the Union intends to file a grievance regarding the dispute between the Union and Brandsafway Services LLC (formerly known as Safeway Services LLC) to address the existence or non-existence of an agreement between Brandsafway Services LLC and the Union and if the June 1, 2018 letter to the Union constituted proper and timely notice under the terms of the LMA.

On October 2, 2019 Laborers filed a grievance with Brandsafway Services LLC stating, in relevant part, the Union "recently became aware that there is a dispute between the Union and Brandsafway Services LLC (formerly known as Safway Services LLC) over whether Brandsafway Services LLC ... is bound to the terms of the Laborers Master Agreement (LMA)." (Ex. L-2, Exhibit 20.)

On October 31, 2019, Laborers amended the August 1, 2019, grievance, directing it solely to "Brandsafway Industries, LLC." (Ex. L-2, Exhibit 27.) The remedy requested was "that Brandsafway Industries (formerly known as Brand Energy Services) recognize that they are bound by the terms of the LMA and recognize their ongoing obligation to comply with the terms of the LMA, including but not limited to Sections 1, through 39."<sup>2</sup>

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As evidenced by Laborers Exhibit 4 supplemented to the record by motion dated February 19, 2020, Laborers settled the August 1, 2019 grievance with Brand Safway Industries, f/k/a Brand Energy Services, Inc., on January 22, 2020.

On November 12, 2019, Brandsafway Services, LLC, (hereinafter "Brandsafway"), filed an unfair labor practice charge against Southwest Regional Council of Carpenters, (hereinafter "Carpenters"), alleging:

Within the past six months, the Southwest Regional Council of Carpenters has threatened to picket and strike against BrandSafway Services, LLC, ("BSS") in support of its demands for continued assignment of certain work. This threat is in violation of section 8(b)(4)(ii)(D) of the Act.

Laborers Local 169 has demanded reassignment of the same work to Local 169 members through verbal conduct and the filing of a labor contract grievance.

On December 20, 2019. Laborers submitted its response to Region 32, attaching thereto 31 exhibits. (Ex. L-2.)

On December 23, 2019 Region 32 issued a "Notice Of Hearing" scheduling a hearing for February 10, 2020, but Involved Party Laborers was not notified of, or served with the Notice. Accordingly, the hearing was rescheduled for and held on February 18, 2020. The December 23<sup>rd</sup> Notice identified the following work:

The loading/unloading, moving, erecting and dismantling scaffolding and related cleanup at the Marriott Aloft Hotel project in Reno, Nevada.

Having learned that a hearing was scheduled for February 18, 2020, on February 12, 2020, Laborers filed a "Motion To Defer" with Region 32 pursuant to the Board's deferral policy whenever an arbitration might affect the proceedings before the Board, submitting "that this is such a case and further proceedings before the Board should be stayed pending resolution of the arbitration

proceedings between the [Laborers and Brandsafway Services, LLC].” Within said Motion Laborers advised that on November 22, 2019, BrandSafway Services confirmed it would participate in an arbitration without waiving its objections, and further advised that the parties had selected an arbitrator on December 9, 2019, and that the hearing concerning the grievance dated October 2, 2019, concerning the issue of whether BrandSafway Services LLC is bound to the terms of the Laborers Master Agreement would be heard on March 17, 2020.

On February 18, 2020, Laborers filed a “MOTION TO QUASH NOTICE OF HEARING” at the hearing, (EX. L-1), “on the grounds that Laborers Local 169 has not made, and is not making a claim for the work described in Notice of Hearing, i.e., “the loading/unloading, moving, directing and dismantling scaffolding and related cleanup at the Marriott Aloft Hotel project in Reno, Nevada.” Attached to said Motion was the declaration of Richard “Skip” Daly who stated in relevant part:

That Laborers Local 169 is not, and has not, made a demand to Brandafway Services, LLC, that it assign “The loading/unloading, moving, erecting and dismantling scaffolding and related cleanup at the Marriott Aloft Hotel project in Reno, Nevada,” to workers represented by Laborers Local 169, or any similar demand.

## II.

### ARGUMENT

#### A. The Motion To Quash should be granted.

As noted above, on February 18, 2020, at the beginning of the

hearing Laborers filed a Motion To Quash Notice Of Hearing on the grounds that Laborers had not, and were not making a claim for the work described in the Notice Of Hearing.

The adverse parties, however, contend that the filing of the grievance on August 1, 2019, belies Laborers's position, even though that grievance was amended and filed against a non-party - BrandSafway Industries, LLC - as evidenced by Laborers's letter of October 31, 2019. (Ex. L-2, Exhibit 27.) The position of the Employer and Carpenters is wrong.

As noted above, on October 2, 2019, Laborers filed a new and separate grievance with BSS to resolve the dispute "over whether Brandsafway Services LLC ... is bound to the terms of the Laborers Master Agreement (LMA)." (Ex. L-2, Exhibit 20.) Such grievance was clearly filed before the Charge and obviously before there has been a determination of it.

It is not unlawful under the Act to file a grievance for breach of contract. In Longshoremen ILWU Local 7 (George Pacific II), 291 NLRB 89 (1988), the Board held that the mere filing of an arguably meritorious grievance before the Board has issued a 10(k) award does not violate the Act and does not constitute coercion within the meaning of Section 8(b)(4)(ii)(D). The Board ruled:

In light of the strong Congressional policy of encouraging the private settlement of disputes through the grievance arbitration machinery the Board should be reluctant to find that the mere filing of an arguably meritorious contractual grievance is prohibited under the Act.

291 NLRB at 92. See also, Brockton Newspaper Guild (Enterprise Publishing), 275 NLRB 135, 136 (1985) ("Absent evidence of other threats, restraint, or coercion, ... a threat merely to file a grievance or invoke arbitration in pursuit of an arguably meritorious contractual claim does not violate the Act.").

The case of Capitol Drilling Supplies, 318 NLRB 809 (1995), is very similar to and relevant to the case before the Board in this matter. In that case the Operating Engineers union filed a grievance with the general contractor alleging that it had improperly subcontracted work in violation of the CBA. The union that was performing the work for Capitol Drilling Supplies, the Laborers, threatened to picket if it reassigned the work to the operating engineers. Capitol Drilling then filed a 10(k) charge against the Laborers union alleging it had engaged in prohibited conduct with an objective of forcing it to assign certain work to the Laborers. The Operating Engineers contended the case was not a jurisdictional dispute, but was a contractual dispute between it and the general contractor, and argued it never sought to have the work in question assigned to it, nor had it threatened or coerced Capitol Drilling in order to acquire such work, and thus it moved to quash the notice of the hearing. In ordering that the notice of hearing issued in that case should be quashed, the Board stated:

[I]n 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 that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such actions.

This holding proceeds from our recognition that, for purposes of Section 10(k), competing claims must be claims made in the same dispute. In circumstances like those in *Slattery Associates* and in this case, however, there are two entirely separate disputes, even though both ultimately concerned the same work. First there is the dispute created by the grievance filed by a union under its agreement with the general contractor protesting that contractor's alleged subcontracting of work in breach of the union signatory subcontracting clause, i.e., the contractor's subcontracting to an employer that declines to be bound by the collective-bargaining agreement with respect to that work. Second, there is the dispute that typically arises when the union representing the employees of the employer to which the work was subcontracted threatens to take coercive action against *that* employer if the work is reassigned to any other group of employees. Although the first union's successful prosecution of its grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union, the fact remains that **the first union never engaged in any dispute with the subcontractor**. And in such a case the general contractor's actions reflect merely its fulfillment of its union signatory subcontracting obligation under the collective - bargaining agreement with the first union. (Italicized emphasis supplied; underlined and bolded emphasis added.)

318 NLRB at 810.

Then, on page 812 the Board stated:

Our holding today will effectuate the policies of the Act by recognizing a party's right, and enabling a party to effectively exercise the right, to enforce a lawful union signatory clause in the collective bargaining agreement . . . .

Although the grievance filed by Laborers against BSS does not involve a subcontracting clause which might result in a finding of a breach by a general contractor of such clause, the logic and reasoning of the Board's decision in *Capitol Drilling* applies here. The grievance Laborers filed on October 2, 2019, (Ex. L-2, Exhibit 20), seeks a decision as to whether BSS properly terminated its bargaining relationship with Laborers in 2018 consistent with the terms of the LMA. It does not seek an assignment of work of any type and Laborers has not threatened to picket or boycott any entity.

As evidenced by Section 39 of the current LMA, titled "Effective And Termination Date," and which contains identical language to the 2015-2018 LMA, with the exception of dates that were changed in the 2018 negotiations, (Ex. L-3, page numbers 62-64), and which Laborers relied upon when it filed the October 2, 2019, grievance, there are negotiated timelines and procedures which a contractor that desires to terminate its bargaining relationship with Laborers must follow. The first paragraph of Section 39 states:

This Agreement shall be effective as of the sixteenth day of July 2018, and shall remain in full force and effect to and including July 15, 2021 and continue in full force and effect from year to year thereafter unless the Union, the AGC or an individual Employer signatory and or bound hereto shall give written notice to the other sent to their last known address of a desire to change the wages, hours, terms, and working condition hereof or to terminate the Agreement not more than ninety (90) days nor less than sixty (60) days prior to July 15, 2021 of

any succeeding year.

As evidenced by the documents referenced hereinabove, BSS contends it terminated the bargaining relationship in 2018, whereas Laborers contends BSS failed to adhere to the negotiated provisions of the LMA required to be followed before a termination can be effected. As evidenced by Hearing Exhibit L-2, Exhibit 11, Letter dated June 1, 2018, which states, in relevant part: "Safway declines to recognize or bargain with the union for any successor agreement," the Company contends it is not bound to the current LMA. And, as evidenced by Hearing Exhibit L-2, Exhibit 12, Letter dated June 12, 2018, from counsel for Laborers, which states, in relevant part: "it is and remains the Union's unequivocal position that Safway Services, LLC failed to provide adequate or effective notice under the provisions of Section 39 of the Master Agreement and that it will continue to be bound by the results of the current negotiations for any successor agreement ...," Laborers contends otherwise. Section 9 of the current and prior LMA, is titled "Grievance Procedure" provides that "disputes" are to be resolved as negotiated. The first paragraph of Section 9 states:

Should a controversy, dispute or disagreement arise during the period of this Agreement over interpretations and operations of this Agreement, the difference shall be adjusted in the following manner.

Thus, it became necessary for Laborers to file the October 2, 2019, grievance after the confusion of entities was finally clarified. The grievance filed by Laborers on October 2, 2019,

i.e., well before the charge was filed in this case, is separate and apart from the work alleged to be at issue in this case, and is to be decided in a different, lawful, forum, notwithstanding the spin and sophistry BSS and Carpenters have put on the grievance.

On cross-examination of Business Manager Daly the BSS attorney asked a hypothetical question concerning a potential outcome of the grievance being positive to Laborers: "[I]f in fact, you're correct that there is an agreement, the Laborers Master Agreement applies to BrandSafway Services' work in this area, isn't it true that the Laborers would demand assignment of scaffolding work?" (TR. 110.) Mr. Daly responded: "Again, that's a hypothetical question, and ... the answer has not been determined ... ." (*Id.*)

Hearing Officer Hajduk also asked followup questions about the October 2, 2019, grievance for clarification and the following questions and answers were recorded at pages 133-135 of the transcript:

HEARING OFFICER HAJDUK: The issues there are whether or not there is an agreement between BrandSafway and the Laborers?

THE WITNESS: Yes, that's the question that was answered or asked, is it agreement, and if there was, reuse the letter that was sent I believe June 1<sup>st</sup>, 2018, did that constitute proper and timely notice --

HEARING OFFICER HAJDUK: So if there is an agreement, what's the remedy, then, for the Laborers?

THE WITNESS: What do you mean?

HEARING OFFICER HAJDUK: So let's assume that the arbitrator were to say that there was an agreement. What

would the remedy be for the Laborers?

THE WITNESS: If there is an agreement -- again, like I say, still unknown, hypothetical type of deal is we would -- the contractor would be in violation if they didn't follow.

HEARING OFFICER HAJDUK: Meaning that you would seek the assignment of the work?

THE WITNESS: I would expect them to follow the terms and conditions of the agreement.

HEARING OFFICER HAJDUK: Okay, well let me put it more bluntly. If they did say that there wasn't an agreement, you -- the remedy sought would be assigning Laborers to perform the scaffolding work; is that correct?

THE WITNESS: We -- the Laborers work under the agreement.

HEARING OFFICER HAJDUK: Which include scaffolding?

THE WITNESS: Tending to Carpenters.

HEARING OFFICER HAJDUK: Okay. Does that include scaffolding when you say tending to Carpenters?

THE WITNESS: If they're doing scaffolding work.

HEARING OFFICER HAJDUK: Okay. Fair enough. Anyone else have any further questions?

As evidenced by the responses given by Business Manager Daly to the hypothetical questions of counsel for BSS and the Hearing Officer, Mr. Daly testified truthfully that, until there is a resolution of the October 2, 2019, grievance he could not know what the future might hold, or what path Laborers might choose.

It is respectfully submitted any speculative answers given in response to a hypothetical questions in a 10(k) hearing cannot be shoehorned into a violation of the Act, and simply are not relevant

or applicable to this case. Yet, that is clearly what BSS's counsel was attempting to do. As noted above, it is not a violation of the act to file and pursue a grievance before the Board has issued a 10(k) award. Furthermore, the hypothetical question disregards the Board's policy that it will generally issue an award in a 10(k) matter only concerning the "work in dispute." "The Board will not impose a broad award in the absence of evidence demonstrating that the union against which the broad award will lie has resorted to unlawful means to obtain work and that such unlawful conduct will recur." Laborers Local 242 (Johnson Gun-ite), 310 NLRB 1335, 1338 (1993); Electrical Workers Local 71 (Thompson Electric, Inc.), 362 NLRB 1176, 1181 (2015).

The Company and the Carpenters obviously want to expand the work at issue stated in the Notice Of Hearing to any other project BSS is doing in Northern Nevada. But, as noted above, the Board policy is to rule only on the work stated in the Notice of Hearing, absent evidence that might justify a broad award. In the instant case, *there is no such evidence.*

In an obvious attempt to get an areawide award, even though the Laborers have not agreed to such, and despite the fact that Laborers do not claim the work in dispute as stated in the Notice Of Hearing, the Employer introduced as its Exhibit 4 a picture of a man alleged to be with Laborers and alleged to be taking pictures of some work on a job located in Reno, Nevada. Accompanying the

picture were text messages between two BSS employees, but no audio of anything the man is alleged to have said. But, when the BSS representative at the hearing, Mr. Headrick, was asked if "a laborer was taking a picture on one of your jobs, is that illegal activity?", Mr. Headrick responded, "I didn't say it was." (Tr. 140.) And, there is absolutely no evidence the man in the picture was doing anything illegal or employing proscribed activities, or even whether he was there on a matter concerning another subcontractor or the general contractor.

As stated in Capitol Drilling, 318 NLRB at 810:

It is well settled that the standard in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. It requires a finding that there is reasonable cause to believe (1) that a party has used proscribed means to enforce its claims to the work in dispute **and** (2) that there are competing claims to the disputed work between rival groups of employees. (Emphasis added.)<sup>3</sup>

In the instant case there is no competing claim to the disputed work by Laborers. In addition to the Declaration of Richard Daly filed with the Motion To Quash, see also Transcript pages 15, 18, 21, 89, 99, and 113.

In applying the criteria noted above, it is respectfully submitted all three criteria have not been met. Specifically, in this case there is no competing claim for the work identified in

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In Laborers Local 265 (AMS Construction), 356 NLRB 306, 308 (2010), the Board also consider whether the parties have agreed on a method of voluntary adjustment of the dispute. The parties stipulated there is no agreed upon method for voluntary adjustment of the dispute. Tr. 21-22.

the Notice Of Hearing.

Therefore, for any or all of the reasons stated hereinabove, it is respectfully submitted the Motion To Quash Notice Of Hearing must be granted.

### III.

#### CONCLUSION

As demonstrated hereinabove, there is no competing claim for the work in dispute.

The October 2, 2019 grievance does not constitute a claim for the work in dispute as it was clearly filed after the confusion of the names of the multiple entities containing "Brand" as part of a company name, and was filed against BrandSafway Services LLC for the sole purpose of determining whether *that* company terminated the Laborers Master agreement consistent with the terms of the Agreement, as BSS contends. Moreover, the grievance was filed well before the charge in this case was filed and it is arguably meritorious and therefore not a proscribed activity violative of the Act.

Accordingly, it is respectfully submitted the criteria employed by the Board to determine whether it has jurisdiction to render a 10(k) award has not been met in this case, and therefore,

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the Notice Of Hearing must be quashed and the case dismissed.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of March, 2020.



Michael E. Langton, Esq.  
Nevada Bar # 290  
801 Riverside Drive  
Reno, NV 89503  
(775) 329-7557

Attorney for Involved Party  
Laborers International Union  
Of North America, Local 169

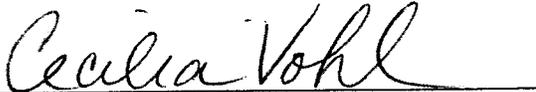
**CERTIFICATE OF SERVICE**

I, Cecilia Vohl, an employee of the Law offices of Michael E. Langton, do hereby certify that the above referenced **POST HEARING BRIEF OF INVOLVED PARTY LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 169**, was served by me electronically this 10<sup>th</sup> day of March, 2020 ,on the persons listed below:

Timothy C. Kamin, Esq.  
Attorney for BrandSafway Services LLC  
[timothy.kamin@ogletree.com](mailto:timothy.kamin@ogletree.com)

Daniel M. Shanley, Esq.  
Attorney for Southwest Regional Council of Carpenters  
[dshanley@deconsel.com](mailto:dshanley@deconsel.com)

Teresa Mueller, Esq.  
Attorney for BrandSafway Services LLC  
[Tmueller@brandsafway.com](mailto:Tmueller@brandsafway.com)

  
Cecilia Vohl, Legal Assistant