

1871
MAY 10
1871

LAW OFFICES
BINGHAM, HURST & APODACA
A PROFESSIONAL CORPORATION

LILLIAN G. APODACA*
WAYNE E. BINGHAM**
M. DWIGHT HURST

*ALSO LICENSED IN KANSAS
**ALSO LICENSED IN COLORADO

2420 COMANCHE ROAD, NE
SUITE H6
ALBUQUERQUE, NEW MEXICO 87107-4633
TEL (505) 881-4545
FAX (505) 889-0988
WWW.BINGHAMHURST.COM

February 9, 2021

BY FEDERAL EXPRESS-PRIORITY OVERNIGHT DELIVERY

Ms. Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

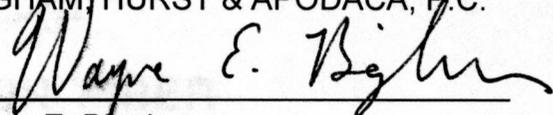
Re: Request for Review
***Westside Plumbing, LLC and United Association of Plumbers and
Pipefitters, Local 412***
Case 28-RC-263057

Dear Ms. Rothschild:

Please find enclosed for filing in the above matter an original and five (5) copies of the Employer's Request for Board Review of Regional Director's Actions which contains a Certificate of Service to the Regional Director and Petitioner's counsel, Kathleen Bichner. Thank you.

Sincerely,

BINGHAM, HURST & APODACA, P.C.



Wayne E. Bingham

Enc. as indicated

cc: Mr. Cornele Overstreet (by e-mail)
Ms. Kathleen Bichner (by e-mail)

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

WESTSIDE PLUMBING LLC

Employer/Appellant

and

Case 28-RC-263057

**UNITED ASSOCIATION OF PLUMBERS
AND PIPEFITTERS LOCAL 412**

Petitioner/Appellee

**EMPLOYER WESTSIDE PLUMBING LLC'S
REQUEST FOR BOARD REVIEW OF
REGIONAL DIRECTOR'S ACTIONS**

Comes now Employer Westside Plumbing, LLC (herein Westside), through counsel Bingham, Hurst & Apodaca, P.C. (Wayne E. Bingham), and pursuant to Section 102.67(c) and (d) of the Board's Rules and Regulations, files its Request for Board Review of Regional Director's Actions. In support of this request, Westside would show the Board that, as a result of the Regional Director's Decision and Direction of Second Election issued January 29, 2021, substantial questions of law and/or policy are raised because of a departure from officially-reported Board precedent, and that the Regional Director's Decision of January 29, 2021 is clearly erroneous on the record, and such error prejudicially effects the rights of Westside.

The Regional Director's Decision and Direction of a Second Election centers on the following written statement distributed by Westside to its employees before a mail ballot election conducted from September 9, 2020 through September 23, 2020.

WESTSIDE PLUMBING

Statement Concerning Unions

Since its beginning, Westside Plumbing has been a non-union company and it desires to remain non-union.

While employees are free to join or not join a union, Westside believes that it is in everyone's best interest that the Company remain non-union. The reason for this is straightforward.

In New Mexico, 92% of the construction industry is non-union. This means that most of Westside's competition are non-union companies. In order to remain competitive, Westside must remain non-union. Obviously, if union companies were competitive, their percentage in the construction industry would be greater than 8%.

Westside Plumbing believes that employees' job security is best maintained by being non-union. That is, Westside remains in business only so long as it gets work, which it gets by being the low bidder. If Westside doesn't get the work, then its employees do not have jobs. Westside can get the work only if it is competitive. Westside can only be competitive if it is a non-union company. Thank you for your support.

Monte Mola.

Basically, the Regional Director adopted the Hearing Officer's Report on Objections and found that the above statement constituted a threat of job loss. Westside contended that the statement was not a threat of job loss but a statement of the competitive reality faced by Westside, and, hence, appropriate, permissible and true, consistent with ***NLRB v. Gissell Packing Co.***, 395 U.S. 575 (1969), ***Midland National Life Insurance Co.***, 263 NLRB 127, 133 (1982), ***CPP Pinkerton***, 309 NLRB 723 (1992), ***Manhattan Crown Plaza***, 341 NLRB 619 (2004), ***LenKurt Electric Co.***, 438 F.2d 1102 (1971), and ***Desert Laundry-A Corp.***, 192 NLRB 1032 (1971).

Westside submits to the Board that the Regional Director's Decision departs from officially-reported Board precedent in that the Decision is contrary to the holdings in the

above cases (contrary to precedent). The Decision is also clearly erroneous on the record to the prejudice of Westside as follows:

After Westside presented evidence that the construction industry is 92% non-union, (Board Exhibit #5), the Hearing Officer and, subsequently, the Regional Director, found that the above statement by Westside "*reasonably tended to interfere with employee free choice.*"

To show that the Hearing Officer's, and subsequently the Regional Director's, finding that the above statement "*reasonably tended to interfere with employee free choice*" is erroneous, it is useful to break down the statement.

Westside's belief "*that employees' job security is best maintained by being non-union*" is clarified factually in the next sentence, which reads, "*Westside remains in business only so long as it gets work, which it gets by being the low bidder.*" That this statement is true is self-evident, if construction contractors are not low bidders, they don't get work. Also, it is true that if construction contractors don't get work, employees don't have jobs. Witness the extremely high unemployment numbers due to pay-offs due to COVID 19, to which the Board can take judicial notice.

In this statement, Westside is not stating that employees will lose their jobs if the union wins the election. All Westside is stating is that Westside can only get work if it is competitive, and its competition is 92% of the construction industry. Competition is extreme. On this point, the Board should also take judicial notice of Monte Mola's (Westside's owner), statement taken by the Hearing Officer in Case No. 28-CA-263062, wherein it is established that union employees working under contract make more than

\$30.00 per hour plus fringe benefits. Westside employees make \$17.00 per hour, + or -. This is why the unionized percentage of the construction industry is only 8%. Obviously, Westside cannot be competitive with 92% of the construction industry and pay employees \$30.00 per hour.

Given a closer examination of the above statement, the Employer is not saying there would be adverse consequences if the employees chose to unionize. The Employer is only stating that jobs “*could be*” jeopardized if Westside could not get work by remaining competitive. This statement is permissible consistent with **CCP Pinkerton, infra**. See also **Manhattan Crown Plaza, infra**. The letter described what could happen if Westside was not the low bidder on work, not what will or would happen. The statement is permissible consistent with **Manhattan Crown Plaza, infra**. Further, consistent with **Desert Laundry-A Corp., infra**, Westside’s statement was merely a statement of opinion about what might occur if Westside did not get work. Again, the statement is permissible.

Beyond this, the statement clearly states that, “*employees are free to join or not join a union...*”, thus establishing that the statement did not interfere with employees’ free choice.

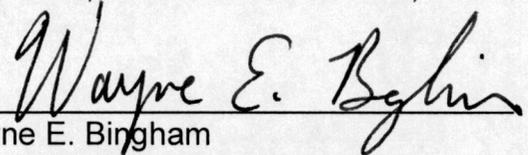
The Hearing Officer’s finding that in the instant case, “*the Employer is presenting as fact that employees will not have work, because the Employer will not have work, if they elect the union*” (HOR page 15), subsequently adopted by the Regional Director, is without basis and should be rejected by the Board, as the finding is contrary to established precedent and factually erroneous based on the record.

Additionally, the Regional Director did not deal with the reality that due to Westside's employees' possible immigration status that they would not vote in a mail ballot election because the ballot would be coming from a federal agency and, under the Trump administration, they would fear deportation. See Westside's "Position Statement on Method of Election" dated August 3, 2020.

Further, Westside relied on **NLRB v. Gissel Packing Co.**, 395 U.S. 575 (1969), **Midland National Life Insurance Co.**, 263 NLRB 127 (1982), and the precedent cited above establishing that the above statement was permissible. The statement remains permissible for the reasons set forth above, and the Board should reverse the Decision of the Regional Director.

Respectfully submitted by:

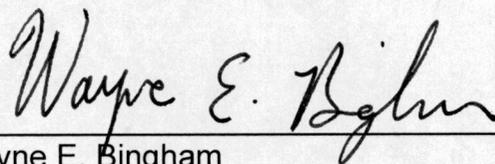
BINGHAM, HURST & APODACA, P.C.



Wayne E. Bingham
Attorney for Westside Plumbing, LLC
2420 Comanche NE, Ste. H-6
Albuquerque, NM 87107
Telephone: (505) 881-4545
wbingham@binghamhurst.com

I hereby certify that this Request was served electronically as follows on this 9th day of February, 2021:

Kathleen Bichner
kbichner@odonoghuelaw.com



Wayne E. Bingham

Cornele A. Overstreet
Regional Director
c/o Dawn Moore
DawnM.Moore@nlrb.gov

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

WESTSIDE PLUMBING LLC

Employer/Appellant

and

Case 28-RC-263057

**UNITED ASSOCIATION OF PLUMBERS
AND PIPEFITTERS LOCAL 412**

Petitioner/Appellee

**EMPLOYER WESTSIDE PLUMBING LLC'S
REQUEST FOR BOARD REVIEW OF
REGIONAL DIRECTOR'S ACTIONS**

Comes now Employer Westside Plumbing, LLC (herein Westside), through counsel Bingham, Hurst & Apodaca, P.C. (Wayne E. Bingham), and pursuant to Section 102.67(c) and (d) of the Board's Rules and Regulations, files its Request for Board Review of Regional Director's Actions. In support of this request, Westside would show the Board that, as a result of the Regional Director's Decision and Direction of Second Election issued January 29, 2021, substantial questions of law and/or policy are raised because of a departure from officially-reported Board precedent, and that the Regional Director's Decision of January 29, 2021 is clearly erroneous on the record, and such error prejudicially effects the rights of Westside.

The Regional Director's Decision and Direction of a Second Election centers on the following written statement distributed by Westside to its employees before a mail ballot election conducted from September 9, 2020 through September 23, 2020.

WESTSIDE PLUMBING

Statement Concerning Unions

Since its beginning, Westside Plumbing has been a non-union company and it desires to remain non-union.

While employees are free to join or not join a union, Westside believes that it is in everyone's best interest that the Company remain non-union. The reason for this is straightforward.

In New Mexico, 92% of the construction industry is non-union. This means that most of Westside's competition are non-union companies. In order to remain competitive, Westside must remain non-union. Obviously, if union companies were competitive, their percentage in the construction industry would be greater than 8%.

Westside Plumbing believes that employees' job security is best maintained by being non-union. That is, Westside remains in business only so long as it gets work, which it gets by being the low bidder. If Westside doesn't get the work, then its employees do not have jobs. Westside can get the work only if it is competitive. Westside can only be competitive if it is a non-union company. Thank you for your support.

Monte Mola.

Basically, the Regional Director adopted the Hearing Officer's Report on Objections and found that the above statement constituted a threat of job loss. Westside contended that the statement was not a threat of job loss but a statement of the competitive reality faced by Westside, and, hence, appropriate, permissible and true, consistent with **NLRB v. Gissell Packing Co.**, 395 U.S. 575 (1969), **Midland National Life Insurance Co.**, 263 NLRB 127, 133 (1982), **CPP Pinkerton**, 309 NLRB 723 (1992), **Manhattan Crown Plaza**, 341 NLRB 619 (2004), **LenKurt Electric Co.**, 438 F.2d 1102 (1971), and **Desert Laundry-A Corp.**, 192 NLRB 1032 (1971).

Westside submits to the Board that the Regional Director's Decision departs from officially-reported Board precedent in that the Decision is contrary to the holdings in the

above cases (contrary to precedent). The Decision is also clearly erroneous on the record to the prejudice of Westside as follows:

After Westside presented evidence that the construction industry is 92% non-union, (Board Exhibit #5), the Hearing Officer and, subsequently, the Regional Director, found that the above statement by Westside "*reasonably tended to interfere with employee free choice.*"

To show that the Hearing Officer's, and subsequently the Regional Director's, finding that the above statement "*reasonably tended to interfere with employee free choice*" is erroneous, it is useful to break down the statement.

Westside's belief "*that employees' job security is best maintained by being non-union*" is clarified factually in the next sentence, which reads, "*Westside remains in business only so long as it gets work, which it gets by being the low bidder.*" That this statement is true is self-evident, if construction contractors are not low bidders, they don't get work. Also, it is true that if construction contractors don't get work, employees don't have jobs. Witness the extremely high unemployment numbers due to pay-offs due to COVID 19, to which the Board can take judicial notice.

In this statement, Westside is not stating that employees will lose their jobs if the union wins the election. All Westside is stating is that Westside can only get work if it is competitive, and its competition is 92% of the construction industry. Competition is extreme. On this point, the Board should also take judicial notice of Monte Mola's (Westside's owner), statement taken by the Hearing Officer in Case No. 28-CA-263062, wherein it is established that union employees working under contract make more than

\$30.00 per hour plus fringe benefits. Westside employees make \$17.00 per hour, + or -. This is why the unionized percentage of the construction industry is only 8%. Obviously, Westside cannot be competitive with 92% of the construction industry and pay employees \$30.00 per hour.

Given a closer examination of the above statement, the Employer is not saying there would be adverse consequences if the employees chose to unionize. The Employer is only stating that jobs “*could be*” jeopardized if Westside could not get work by remaining competitive. This statement is permissible consistent with **CCP Pinkerton, infra**. See also **Manhattan Crown Plaza, infra**. The letter described what could happen if Westside was not the low bidder on work, not what will or would happen. The statement is permissible consistent with **Manhattan Crown Plaza, infra**. Further, consistent with **Desert Laundry-A Corp., infra**, Westside’s statement was merely a statement of opinion about what might occur if Westside did not get work. Again, the statement is permissible.

Beyond this, the statement clearly states that, “*employees are free to join or not join a union...*”, thus establishing that the statement did not interfere with employees’ free choice.

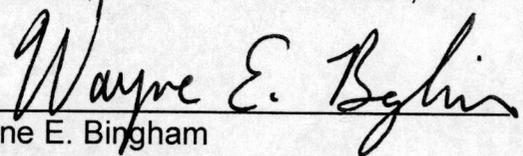
The Hearing Officer’s finding that in the instant case, “*the Employer is presenting as fact that employees will not have work, because the Employer will not have work, if they elect the union*” (HOR page 15), subsequently adopted by the Regional Director, is without basis and should be rejected by the Board, as the finding is contrary to established precedent and factually erroneous based on the record.

Additionally, the Regional Director did not deal with the reality that due to Westside's employees' possible immigration status that they would not vote in a mail ballot election because the ballot would be coming from a federal agency and, under the Trump administration, they would fear deportation. See Westside's "Position Statement on Method of Election" dated August 3, 2020.

Further, Westside relied on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), and the precedent cited above establishing that the above statement was permissible. The statement remains permissible for the reasons set forth above, and the Board should reverse the Decision of the Regional Director.

Respectfully submitted by:

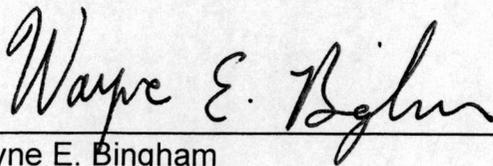
BINGHAM, HURST & APODACA, P.C.



Wayne E. Bingham
Attorney for Westside Plumbing, LLC
2420 Comanche NE, Ste. H-6
Albuquerque, NM 87107
Telephone: (505) 881-4545
wbingham@binghamhurst.com

I hereby certify that this Request was served electronically as follows on this 9th day of February, 2021:

Kathleen Bichner
kbichner@odonoghuelaw.com



Wayne E. Bingham

Cornele A. Overstreet
Regional Director
c/o Dawn Moore
DawnM.Moore@nrlb.gov

fedex.com 1.800.GoFedEx 1.800.463.3339

1 From

Date 2/9/21

Sender's Name Wayne E Bingham Phone 505 881-4545

Company BINGHAM HURST APODACA, PC

Address 2420 COMANCHE RD NE STE H6
Dept./Floor/Suite/Room

City ALBUQUERQUE State NM ZIP 87107-4633

2 Your Internal Billing Reference

9174 029

3 To

Recipient's Name Raymond R. Bingham Phone 202 273-1710

Company National Labor Relations Board

Address 1115 H St NE
We cannot deliver to P.O. boxes or P.O. ZIP codes. Dept./Floor/Suite/Room

Address Washington DC
Use this line for the HOLD location address or for continuation of your shipping address.

City Washington DC State DC ZIP 20570

Hold Weekday
FedEx location address
REQUIRED. NOT available for
FedEx First Overnight.

Hold Saturday
FedEx location address
REQUIRED. Available ONLY for
FedEx Priority Overnight and
FedEx 2Day to select locations.



8139 1107 5220

4 Express Package Service * To most locations. *Packages up to 150 lbs. For packages over 150 lbs, use the FedEx Express Freight US Airbill.*

Next Business Day

FedEx First Overnight
Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless Saturday Delivery is selected.

FedEx Priority Overnight
Next business morning.* Friday shipments will be delivered on Monday unless Saturday Delivery is selected.

FedEx Standard Overnight
Next business afternoon.* Saturday Delivery NOT available.

2 or 3 Business Days

FedEx 2Day A.M.
Second business morning.* Saturday Delivery NOT available.

FedEx 2Day
Second business afternoon.* Thursday shipments will be delivered on Monday unless Saturday Delivery is selected.

FedEx Express Saver
Third business day.* Saturday Delivery NOT available.

5 Packaging * Declared value limit \$500.

FedEx Envelope* **FedEx Pak*** **FedEx Box** **FedEx Tube** **Other**

6 Special Handling and Delivery Signature Options Fees may apply. See the FedEx Service Guide.

Saturday Delivery
NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

No Signature Required **Direct Signature** **Indirect Signature**
Package may be left without obtaining a signature for delivery. Someone at recipient's address may sign for delivery. If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only.

Does this shipment contain dangerous goods? One box must be checked.

No **Yes** As per attached Shipper's Declaration. **Yes** Shipper's Declaration not required. **Dry Ice** Dry Ice, 9, UN 1845 _____ x _____ kg

Restrictions apply for dangerous goods — see the current FedEx Service Guide. **Cargo Aircraft Only**

7 Payment Bill to: Enter FedEx Acct. No. or Credit Card No. below. Obtain recip. Acct. No.

Sender Acct. No. in Section 1 will be billed. **Recipient** **Third Party** **Credit Card** **Cash/Check**

Total Packages 1 Total Weight _____ lbs. Credit Card Auth. 611

*Our liability is limited to US\$100 unless you declare a higher value. See the current FedEx Service Guide for details.

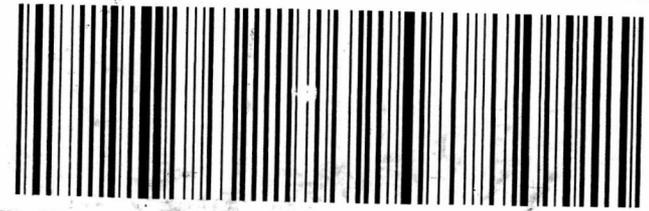
Ref. Date 5/15 • Part #163134 • ©1994-2015 FedEx • PRINTED IN U.S.A. SRM

RT **739** 1 10:30 5220
FZ 02.10

#3 NLRB
FEB 10 2021
MAILROOM

FedEx
TRK# 8139 1107 5220
WED - 10 FEB AA
PRIORITY OVERNIGHT

XC WASA 20570
DC-US
IAD



FID: 3610308 09Feb2021 ABQA 56DG2/259B/1B23
Align bottom of peel-and-stick airbill or pouch here.