United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 30, 2008

TO : James Small, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Southwest Regional Council of Carpenters
(Standard Drywall, Inc.)
Case 21-CD-663 560-7580-4033-0100
560-7580-4033-3000

This case was submitted for advice as to whether a union made a continuing claim to disputed drywall finishing work such that reasonable cause exists to believe it violated Section 8(b)(4)(D). We conclude that the union has made an effective disclaimer of the work.

FACTS

Charging Party Standard Drywall, Inc. (SDI) is a construction contractor headquartered in San Diego, California. Since 2003, SDI has assigned drywall finishing work in southern California to its employees represented by Respondent Southwest Regional Council of Carpenters under successive collective bargaining agreements. SDI uses Carpenter apprentices who are enrolled in the Carpenters' Joint Apprenticeship and Training Committee (JATC) program and it pays them at the contractual apprenticeship rate. Under California law, only apprentices working on prevailing wage projects who are enrolled in a state-approved program may be paid at apprentice wage rates; an employer may use apprentices working in unapproved programs, but only at the journeyman wage rate. The California Division of Apprenticeship Standards (DAS) is charged with assisting employers, labor organizations, and others to establish apprenticeship programs. SDI contends that the Carpenters JATC is state-approved.[1]

[1] As of this date, DAS has not responded to the Region's question as to whether the Carpenters program is approved by the state. In April 2005, Painters Union District Council No. 36 filed a complaint with the California Labor Commissioner alleging, among other things, that the Carpenters apprenticeship program is not state-approved. The matter apparently settled without a formal finding on this issue.

According to an SDI official, within the last few years, Jim Dunleavy, a representative of Painters Union District Council No. 36 (Painters), questioned why the Employer used Carpenters-represented employees and requested that SDI sign with the Painters instead. In July 2007, the Painters Union erected banners at some of SDI's public works projects that bore the legend, "Don't deprive our youth of the Drywall Finisher's Apprenticeship training; Shame on Standard Drywall." Handbills distributed at the sites further urged SDI to "stop the use of incompletely trained apprentices" under the assertedly unrecognized Carpenters apprenticeship program.[2]

By letter to SDI dated December 3, 2007, Painters Contract Compliance Coordinator Emad Aziz stated that SDI had not submitted a signed Participation Agreement for a named public works project with the Painters Union, "the appropriate union for the Drywall Finishers on the project." Aziz requested that an SDI official contact him immediately to arrange a meeting to review and sign the necessary documents. SDI did not respond.

On February 12, 2008,[3] the Painters filed a complaint with the California DAS alleging that SDI violated California Labor Code by "performing drywall finishing work on public projects in Southern California without requesting or employing apprentices indentured in an approved program in the occupation of Drywall Finisher." The Painters stated that SDI was using apprentices from the Carpenters JATC, which it charged was not an approved apprenticeship program in that occupation and therefore SDI had to pay the apprentices the Carpenters' journeyman rate.[4]

Subsequently, on March 5, Aziz sent SDI three letters substantially identical to his December 3 letter. Therein, Aziz requested that SDI enter into Participation Agreements covering the three named public works projects.

By letter to SDI dated March 6, the Carpenters Union indicated that it interpreted the Painters' DAS complaint as a demand for drywall finishing work in violation of their collective bargaining agreement with the Employer.

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[2] The Painters have not subsequently targeted SDI with similar banners or handbills.

[3] All subsequent dates are in 2008 unless specified otherwise.

[4] This complaint is currently pending with the DAS.

The Carpenters stated that it would strike should SDI reassign the finishing work to the Painters Union.

Two representatives of the Painters apprenticeship program sent SDI a series of letters in April and May in which they alleged that SDI was in violation of California Labor Code at approximately 21 named job sites. The representatives stated that "failure to hire apprentices, pay training funds, submit a contract award information form and pay Prevailing wage is a violation of the California Labor Code." They further stated that if compliance is not met, a lien against SDI known as a "stop notice" would be filed, which would prevent the further disbursement of construction funds while the Painters Union pursues a damages claim against the Employer. SDI did not directly respond to these letters.[5]

The Region concluded that by the above conduct, the Painters had made a claim to the work and, on May 30, it issued a Section 10(k) notice of hearing. On the same date, Painters Union business manager Grant Mitchell sent SDI a letter concerning the controversy. Mitchell stated that SDI's obligation when performing drywall finishing work on public projects in California was either to,

> 1) use apprentices from a state approved program for the occupation of drywall finisher or 2) pay all workers performing the drywall finisher work the journeyman rate for that work and make training contributions to an approved program or to the California Apprenticeship Council for the drywall finisher work. [Emphasis in original.]

Noting the relationship between SDI and the Carpenters, Mitchell stated that "the Painters Union does not claim to represent SDI's drywall finishers" and he further posited that "[t]he Painters Union has not demanded or threatened any economic or legal action against SDI with an object of forcing or requiring SDI to assign drywall finishing work." Rather, "the Painters Union has taken steps to enforce the State of California's minimum apprenticeship standards on public works jobs … for the protection of the Painter's state approved drywall finishing apprenticeship program." Mitchell stated that "the Painters Union does not take the position that SDI is obligated to assign work to apprentices from the Painters Union's state approved finishing program." Thus, he denied

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[5] It is unclear whether these apprenticeship program representatives are agents of the Painters Union for the purpose of this dispute.

that the DAS complaint "constitute[d] a demand that the work be assigned to the Painters." Rather, Mitchell stated that,

> [i]f SDI wants to continue to assign drywall finishing work to workers who are not indentured in a state-approved finishing program, however, SDI must comply with California law and pay the journeyman rate. The Painters Union's efforts to enforce these state prevailing law requirements are not a claim for assignment of work on public works projects.

In light of the Painters' letter, the Regional Director removed the 10(k) hearing from the calendar. As of this date, the state agency has not completed the investigation into the Painters' complaint.

ACTION

We conclude that the Painters Union has made an effective disclaimer of the work and thus that reasonable cause does not exist to conclude that Section 8(b)(4)(D) has been violated.

Section 8(b)(4)(ii)(D) prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to one group of employees rather than another. A violation of 8(b)(4)(D) requires a finding that two or more parties have made competing claims to the work. A party may effectively rebut a preliminary reasonable cause finding where it clearly, unequivocally and unqualifiedly disclaims the work. However, the disclaiming party must engage in no subsequent conduct inconsistent with its purported disclaimer.[6]

Initially, it is clear that the Union's December 2007 and March 2008 letters demanding that SDI enter into Participation Agreements, in light of its previous attempts to seek the work, constitute claims to SDI's drywall plastering work. Nonetheless, we conclude that the Union effectively disclaimed that work in its May 30 letter. Therein, Mitchell specifically acknowledged that SDI has no obligation to assign the work to Painters-represented employees and he denied that the Painters claim to

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[6] See Laborers Local 79 (DNA Contracting), 338 NLRB 997, 998-99 (2003).

represent SDI's drywall finishers.[7] The Union has not rendered this disclaimer ineffective by subsequent inconsistent conduct manifesting a continuing jurisdictional claim. Thus, there is no evidence that any Painters agent has reiterated its prior demand that the Employer enter into a Participation Agreement or that the Union has resumed bannering or handbilling at SDI's jobsites.

We further conclude that the Painters' maintenance of its complaint with DAS does not constitute conduct inconsistent with its prior disclaimer. In its letter to SDI, the Union explained that compliance with California law is satisfied by one of two courses of conduct: either use Painters apprentices or use Carpenters apprentices, but at the Carpenters journeyman wage rate. Without attempting to resolve the Painters' state law claim, we conclude that the Union's argument is supported by the legal framework in place in the State of California. Thus, under California law, if the Painters are correct in that they operate the only state-certified apprenticeship program in the geographic area, state law would require SDI either to use their apprentices, or, alternatively, apprentices enrolled in any other non-certified program, but paid at journeyman wage rates. There is no evidence that the Painters Union acted in any manner inconsistent with this either-or proposition. For instance, it has neither sought a remedy before DAS that would require SDI to assign the work only to Painters-represented employees,[8] or offered to withdraw the complaint in return for an award of work.[9] Further, this case is distinguishable from circumstances where the Board held that a union claimed the work by filing a grievance that would require an employer to apply that union's contractual wage rate to any employee actually performing the work. In Laborers Local 113 (Super Excavators, Inc.),[10]

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[7] The Union's disclaimer is sufficiently clear and unequivocal, even without a specific retraction of its prior demands for the work.

[8] Compare Carpenters (Standard Drywall) (SDI II), 348 NLRB No. 87, slip op. at 4 (2006) (claim to work evidenced by Plasterers' lawsuit seeking remedy that would require employer to use union-represented apprentices).

[9] Compare Southwest Regional Council of Carpenters (Standard Drywall, Inc.) (SDI I), 346 NLRB 478, 480 (2006) (Plasterers' offer to secure dismissal of lawsuit in return for obtaining disputed work constituted claim to work).

[10] 338 NLRB 472 (2002).

the Operating Engineers filed a grievance over the employer's use of backhoe operators represented by a rival Laborers Union. The union specifically did not seek to change the assignment of work; rather it requested that the employer pay the Laborers-represented employees wages consistent with the Operating Engineers' own contract. The Board held that, because the Operating Engineers' claim would extend its bargained-for pay scale to non-unit employees, the union never actually relinquished its jurisdictional claim that the work is covered under its collective bargaining agreement.[11] In contrast, the Painters' complaint with DAS does not seek to apply its contract to Carpenters-represented apprentices. Rather, the Union acknowledged that SDI could lawfully continue to use Carpenters apprentices, but only at Carpenters-negotiated journeyman wage rates. Under these specific circumstances, the Painters' attempt to enforce its interpretation of the law, without requiring SDI to apply its own contractual wage rates, does not constitute a continuing claim to the work.

Insofar as the Painters Union has effectively disclaimed the work, there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Consequently, the Region should dismiss this charge, absent withdrawal.

B.J.K.

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[11] Id. at 474. A grievance seeking pay-in-lieu of work similarly constitutes a claim for work, because it requires the employer to pay not only those employees who actually performed the work, but also the grieving union's own employees under the terms of its own contract. Ibid.