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

Advice Memorandum

DATE: November 30, 2007

TO : Richard L. Ahearn, Regional Director
Region 19

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

SUBJECT: Northwest Wall & Ceiling Contractors Assn.
Cases 19-CA-30866, 30867
518-4040-4500

Pacific Northwest Regional Council of Carpenters
530-4075
530-6067-2050-1000

Cases 19-CB-9613, 9614
536-2570

These Section 8(a)(1), (2), (5) and Section 8(b)(1)(A), (2) and (3) cases were submitted for advice as to whether the Northwest Wall & Ceiling Contractors Association (the "Association") (1) unlawfully withdrew recognition from the Cement Masons and Painters unions when it entered into an agreement with the Carpenters allowing signatory contractors to assign the Carpenters certain finishing work which has historically been performed by either the Cement Masons and/or the Painters; and (2) unlawfully assisted the Carpenters in expanding their jurisdiction.[1] We conclude that the charges should be dismissed, absent withdrawal, since the evidence fails to establish that the Carpenters agreement was intended to or did result in any Section 9(a) signatory to the Cement Masons' or Painters' agreements either assigning the disputed finishing work to the Carpenters or withdrawing recognition from the Cement Masons and Painters regarding the disputed work.

FACTS

The Association is the collective bargaining representative of numerous employers involved in the construction industry in Western Washington. The Association bargains area agreements with each of the trades involved in the instant cases. After the Association and the respective unions bargain their area agreement, other contactors and non-members of the Association sign identical "me too" agreements. Cement Masons Local 528 (Cement Masons), Painters District Council

[1] The CB charges allege unlawful acceptance of that recognition and execution of the contract containing the Carpenters' expanded jurisdiction.

No. 5 (Painters) and Pacific Northwest Regional Council of Carpenters (Carpenters) have existing bargaining relationships with the Association. All three unions have historically bargained three-year contracts, which expire in the same year. The Carpenters' prior contract expired on May 31, 2007[2] and both the Cement Masons' and Painters' prior contracts expired on June 30.

The Cement Masons claim Section 9(a) status for employees in their jurisdiction for all but 2 of their 30 signatory employers. Their 9(a) status is primarily based on certifications obtained in 2004. The Painters claim 9(a) status for all 32 signatories to their agreement based on language memorializing the Union's offer to show proof of majority status. The Carpenters added language to its most recent collective-bargaining agreement in 2007 asserting 9(a) status, also based on an actual or offered demonstration of majority support.

The jurisdiction of the Cement Masons includes plaster application, or "wet" work, involved in drywall finishing. The Painters' jurisdictional clause provides that the Painters' work consists of painting, spackling, and other drywall finishing techniques known as the "dry" work in the trade. Prior to 2007, Article 2 of the Carpenters' collective-bargaining agreement described its jurisdiction as primarily the installation and erection of walls and ceilings. The Association and Carpenters assert that there is considerable overlapping jurisdiction with the wall and ceiling industries, and that it is not uncommon for crafts to perform work traditionally done by other crafts and as specifically set forth in each's collective-bargaining agreement.

In May, representatives of the Cement Masons and Painters, who were preparing to enter negotiations with the Association, heard rumors that the Carpenters had proposed adding language to its new agreement that would expand their work jurisdiction to include drywall finishing. The Cement Masons and Painters contacted their contractor base in the Association, and lobbied strongly against the proposed expansion. However, the Association's bargaining team accepted the expanded jurisdiction language as part of the tentative contract with the Carpenters. The Association's members met and ratified the Carpenters' agreement.

Section 2.01 of Article 2 ("Work Description") of the Carpenters' agreement was expanded to state the following:

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[2] All dates are in 2007, unless otherwise noted.

> [The work] shall also include all work in connection with the installation, erection, application **and/or finishing** of all materials and component parts of all partitions regardless of their material composition or method or manner of installation, attachment or connection…**including preparation, finishing, spraying and decoration of all interior and exterior wall finishes...** (Emphasis added to highlight 2007 additions.)

In addition, an entirely new paragraph provides for the assignment of finishing work to another designated union by signatory contractors. It states:

> The Union recognizes the historic separate craft(s) of "finishing" and confirms that a signatory contractor shall assign the finishing work amongst the craft(s) with respect to such finishing work through a separate Union agreement covering finishing/finishers or by written assignment. If a signatory contractor makes no written assignment to a union which is not a party to this agreement within 60 days of becoming bound to the terms of this agreement such finishing work shall as of the 61st day become covered in all respects by this agreement. The Union agrees to promptly notify the Employer of the new contractors who become signatory.

On May 18, prior to the ratification of the Carpenters' agreement, the Association sent a letter to the Carpenters to clarify the meaning of Section 2.01. The letter, which the Carpenters signed, states as follows:

> The Carpenters have given us assurances that it respects the jurisdiction of other crafts where that craft has or does organize workers and that the purpose of the modifications in Section 2.01 are to encourage/obtain full unionization of worksites.

The Painters assert that within days of the Carpenters' agreement being ratified, two contractors, North Pacific Drywall Systems and Northwestern Interiors, signed the Carpenters' agreement as an alternative to the Painters' agreement. However, both contractors had no existing 9(a) relationship with either the Painters or the Cement Masons, and were non-signatory contractors to their agreements.

According to the Charging Parties, no Section 9(a) signatory employers with the Cement Masons and Painters have assigned their finishing work to the Carpenters. In addition, there is no evidence that the Carpenters have made a claim for finishing work of employers who failed to make an assignment under Section 2.01.

ACTION

The Region should dismiss the charges, absent withdrawal, because the evidence fails to establish that the Carpenters' agreement was intended to result or did result in any Section 9(a) signatory to the Cement Masons' or Painters' agreements assigning the disputed finishing work to the Carpenters, or withdrawing recognition from the Cement Masons and Painters as representatives of employees performing disputed work.

The Board has found that an employer violates the Act by recognizing another union as the collective-bargaining representative of their employees at a time when the employer was still obligated to bargain with an existing bargaining representative.[3] Freeman Decorating Co.[4] involved employers who withdrew recognition from an existing bargaining representative, and signed an 8(f) agreement with another union, during the duration of a strike. Having found that the employers' withdrawals were unlawful, the Board affirmed the ALJ's finding that the contracts between the employers and the other union were unlawful because the employers' previous withdrawal of recognition violated 8(a)(5) and (1).[5] Accordingly, the employers and the rival union violated Sections 8(a)(2) and 8(b)(1)(A), respectively.

Following Freeman Decorating, the Board in Gem Management Co.[6] found that an employer violates Section 8(a)(1),(2) and (5) by failing to apply the terms and conditions of an existing 8(f) agreement to a jobsite that fell within the agreement's jurisdiction, giving another

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[3] Freeman Decorating Co., 336 NLRB 1 (2001), enf. denied on other grounds 334 F.3d 27(D.C. Cir. 2003); Bell Energy Management Corp., 291 NLRB 168, 169, n.8 (1988); Ana Colon, Inc., 266 NLRB 611, 612-13 (1983).

[4] 336 NLRB at 3-5.

[5] Id. at 13-14.

[6] 339 NLRB 489, 500-501 (2003), enf'd. 107 Fed.Appx. 576 (6th Cir. 2004).

union the opportunity to sign up members at that jobsite, and paying benefits into that union's benefit funds. Like Freeman Decorating, the employer in Gem Management failed to lawfully withdraw recognition from an existing bargaining representative before entering into an agreement with another union. Consequently, the employer remained bound to the existing 8(f) agreement and violated Sections 8(a)(5) and (d) by failing to apply that contract to the covered work.[7]

However, both Freeman Decorating and Gem Management involved the withdrawal of recognition from an existing bargaining representative and the entering into an agreement with another union to perform the bargaining unit's work. In the instant case, the evidence fails to show that any such withdrawal of recognition has occurred. It is undisputed that after having ratified the Carpenters' new agreement, the Association has continued to bargain with both the Cement Masons and Painters over a new contract, which includes the terms and conditions of the disputed finishing work. Both the Cement Masons and Painters have agreed to new collective-bargaining agreements with the Association that continue to recognize finishing work as part of the scope of the agreements. Therefore, unlike Freeman Decorating and Gem Management, the evidence fails to establish that any withdrawal of recognition from the Cement Masons and Painters occurred, even regarding the disputed finishing work.

The evidence also fails to show that the Association assisted the Carpenters in expanding their jurisdiction into work historically performed by the Cement Masons and Painters.[8] Prior to ratification of the Carpenters' agreement, the Association sought assurances from the Carpenters that it would respect the jurisdiction of the other crafts. In that letter, the Carpenters gave assurances that "it respects the jurisdiction of other crafts where that craft has or does organize workers." We note that there is no evidence of any finishing work previously performed by the Cement Masons and Painters being diverted to the Carpenters as a result of Section 2.01 of the Carpenters' agreement. The Cement Masons and

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[7] Id. at 495-496.

[8] While the Cement Masons and Painters both argue that they have historically performed the disputed finishing work and the work falls within the scope of their agreements, the Association and Carpenters both assert that there is overlapping jurisdiction between the various crafts and are prepared to provide testimony to that effect.

Painters acknowledge that no existing Section 9(a) signatory employers to their contracts have assigned their finishing work to the Carpenters as of November 5, which is now beyond the 60-day "assignment" period provided for in the Carpenters' agreement.

In these circumstances, there currently is insufficient evidence that the Association unlawfully withdrew recognition from the Cement Masons and Painters and thereby granted unlawful assistance to the Carpenters by agreeing to Section 2.01, or that the Carpenters have violated the Act by accepting such assistance. Accordingly, the charges should be dismissed, absent withdrawal. Of course, the Charging Parties can file a new charge if they obtain evidence establishing that a Section 9(a) employer which is bound to a Cement Masons' or Painters' agreement has, at some future time, assigned finishing work to the Carpenters. If that occurs, the Region should assess all the evidence in light of the principles set forth above in reaching a determination regarding the alleged unfair labor practice(s).

B.J.K.