

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DISTRICT COUNCIL 711, INTERNATIONAL
UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO (JC TWO, INC.)

and

Case 4-CC-2484

COSTANZA BUILDERS OF NEW JERSEY, INC.

Bruce G. Conley, Esq., for the General Counsel.

Robert F. O'Brien, Esq. (O'Brien, Belland & Bushinsky, LLC), of Northfield,
New Jersey, for the Respondent.

Marc Furman, Esq. (Cohen, Seglias, Pallas, Greenhall & Furman, PC), of
Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 10, 2007. On January 26, 2007, the Regional Director for Region 4 of the National Labor Relations Board (Board) issued a complaint¹ and notice of hearing based on an unfair labor practice charge filed on December 22, 2006.² The complaint alleges that District Council 711, International Union of Painters and Allied Trades, AFL-CIO (Respondent or Union) violated Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act (the Act) by engaging in conduct having the object of forcing or requiring Costanza Builders of New Jersey (Costanza or Charging Party) to cease doing business with JC Two, Inc., a nonunion company with which the Union has a labor dispute. At the hearing the Respondent amended its answer to admit the complaint allegations in paragraphs 2(d), (f), and 4(b), and it agreed to delete its request for fees and costs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn

¹ The complaint refers to certain dates in calendar year 2007. The General Counsel requests the year be corrected as 2006 in each instance. The unopposed request is granted.

² All dates are in 2006, unless otherwise indicated.

from the record as a whole and, after considering the briefs filed by the counsel for the General Counsel,³ the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Costanza, a New Jersey corporation with offices in Cherry Hill, New Jersey, has at all material times been engaged as a construction manager in the construction industry. During the year preceding the date of the complaint, Costanza in conducting its business operations performed services valued in excess of \$50,000 outside the State of New Jersey. JC Two, Inc., a New Jersey corporation with an office in Voorhees, New Jersey, has at all material times been engaged as a commercial painting contractor. During the year preceding the date of the complaint, JC Two in conducting its business operations received in excess of \$50,000 from Costanza for painting services. The Respondent admits and I find that Costanza and JC Two are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Costanza is the construction manager for the construction of condominium and retail units on the Lumberyards project in Collingswood, New Jersey.⁴ JC Two has been contracted by Costanza to perform painting services at the jobsite. The jobsite is approximately two city blocks by one city block in size. Haddon Avenue borders its north side, Collins Avenue the east, Night Avenue the west, and a high-speed line the south side. During the relevant period, Michael Lee was the Charging Party's vice president of Construction and Christopher Eattock was the project manager. Gregory Fray was the construction manager on the site, and he was responsible for the daily operations at the site. The Charging Party employed union and nonunion contractors on the site.

B. Events of December 19 and Establishment of the Reserve Gate System

During the morning of December 19, Edward McDonald, an organizer for the Respondent, and Michael Kisielewski, the Respondent's business agent, arrived at Eattock's construction trailer on the site and introduced themselves to Eattock as representatives of the Union. McDonald did not testify about this conversation with

³ The General Counsel notes that "Local 274" is mistakenly appended to "Costanza" in the transcript caption. His request that "Local 274" be deleted from the caption of the official record is granted.

⁴ All locations are in New Jersey.

5 Eattock, and Kisielewski did not testify, hence the following is based on Eattock's
 10 credited and undisputed testimony. The men said that they were interested in the
 painting and drywall work and mentioned JC Two and Pentel Enterprises (Pentel was a
 nonunion contractor that was hired to do the drywall). The men expressed their belief
 that the project was closed to union contractors. Eattock disabused them of that belief,
 and directed them to contact the corporate office. The men went to the Collingswood
 mayor's office "to discuss the project." When they returned they told Eattock that they
 were going to picket the jobsite the next day and left.

15 About this same time Fray saw them on the site. He knew them to be union
 representatives and asked what they wanted. They mentioned that JC Two was
 nonunion and that they wanted a union painter on the job or they were going to picket.
 Fray said he would check with his subcontractors. Fray recalled nothing else about this
 conversation.

20 McDonald admitted threatening to picket. McDonald stated as Fray was saying
 that he would speak with his subcontractors, a woman walked by and interjected "that
 there won't be no union painters brought onto this job or whatever." McDonald
 identified her as the owner of JC Two. McDonald also stated that he, Kisielewski, and
 25 Fray talked about JC Two not paying scale, "they're a lower scale than we are."
 McDonald claims to have told Fray that JC Two was a mom and pop company.

30 In response to the Union's threat to picket Lee told Eattock to establish a reserve
 gate system and to prepare letters to fax to the Respondent, as well as all the
 contractors and the unions working on the site. The establishment of a reserve gate
 system was not unknown to the Charging Party, one had previously been established
 on the site, but after a period of time it was no longer maintained.

35 Eattock prepared two signs: one listing the union contractors (to be placed at the
 Haddon Avenue gate, gate A) and another listing the nonunion contractors (to be placed
 at the Collins Avenue gate, gate B). Eattock created a sign listing the union contractors
 in 2-inch lettering. He attached this sign listing all union contractors to a larger yellow
 sign.

40 The larger yellow sign, approximately four square feet, gave instructions for
 entering gate A with the names of the union contractors attached at the bottom:

GATE "A"
 THIS ENTRANCE IS
 RESERVED FOR ANY
 PERSON(S) HAVING
 BUSINESS WITH / OR
 DELIVERIES FOR
 THE FOLLOWING
 CONTRACTORS

- C.J. Mech • Schindler Elev.
- Nelson Cooney

- Majek Fire Prot.
 - A.M.I. Constr.
- ALL OTHERS USE GATE "B"

(GC Exh. 5.)

Eattock prepared another sign listing the nonunion contractors, again in 2-inch lettering:

- | | | |
|------------|----------------|-------|
| • Pentel | • Coffey Bro. | • AFA |
| • JC Two | • Frontier | • A+ |
| • RNR | • East Coast | |
| • Crea | • Mid-Atlantic | |
| • Becksted | • TJ'S | |
| • Bryant | • TC'S | |

(GC Exh. 6.)

He similarly attached this sign listing all nonunion contractors to another yellow 4-foot-by-4-foot sign. This larger sign contained language identical to the yellow sign used at gate A, only replacing "gate A" with "gate B."

Eattock told Fray to post the sign listing the union contractors at gate A (Haddon Avenue) and the sign listing the nonunion contractors at gate B (Collins Avenue). Fray testified that he installed the signs at gates A (union contractors) and B (nonunion contractors) on December 19 or 20. Although Lee and Fray believe that Fray posted the signs at the proper gates on December 20, they and Eattock aver that the signs were in place before they arrived at the site during the morning hours of December 21. General Counsel Exhibit 7 is a photograph of the gate A sign at the Haddon Avenue entrance. A security guard was also stationed at each gate. The guard at gate A was ordered to only allow union contractors to enter. The guard may be seen at the far right of General Counsel Exhibit 7(b), (Tr. 92).

On December 20 at 7:29 p.m. the Charging Party faxed a letter to Kisielewski at the Respondent's office in Glassboro. (GC Exh. 2.) The letter announced the establishment of the reserve gate system and specifically identifies the actions taken by the Charging Party. McDonald denies receiving the fax. The Charging Party faxed a similar letter to Cooney Electric, a union contractor on December 20 at 7:32 p.m. (GC Exh. 4.)

C. The Picketing on December 21

Fray testified that he arrived at gate A between 6:30 and 6:45 a.m. on December 21. Fray testified that the signs at both gates were up because he had attached both signs the previous day. He noticed two people at the gate who were unknown to him and who he assumed they were pickets because of where they were standing. The security guard was at his post and the gate was closed. At approximately 7 a.m. Fray

5 observed that the two men had picket signs and that McDonald had arrived. Fray told McDonald that the pickets were at gate A and that they would have to move to gate B, the gate for the nonunion contractors, located on Collins Avenue. Fray testified that McDonald replied that "they were going to stay there and we would have to do what, you know, whatever we had to do to get them off there."

10 Fray testified that he had given the guard at gate A a list of the contractors who were permitted to use the gate A. He also testified that during his periodic inspections of gate A he observed the guard properly performing his duties. Fray further testified that he never saw any improper use of the gate by anyone, including JC Two employees. He testified that no one, including McDonald, either picket, or the guard, informed him of any improper use of gate A by any contractor, including JC Two.

15 Lee arrived on site at approximately 6:45 a.m., as he drove past gate B he observed two pickets. When he arrived at gate A he observed one picket who was an older man with gray hair. His description matches that of Frederick Macombe, who is the picket standing furthest to the right in General Counsel Exhibit 7(a). As he drove past the picket he told him that he was at the wrong gate. The picket told Lee that he would have to speak to his supervisor who would be arriving soon. Shortly before 7 a.m. Lee saw McDonald standing next to the two pickets. The pickets had sandwich board signs hung from their necks with "JC Two Painting unfair, does not meet area standards established by Painters DC #711," with the union logo beneath the writing. Lee testified that he informed McDonald that a reserve gate system had been established and that the Respondent was picketing the wrong gate. Lee testified that McDonald indicated that he was aware that the pickets were at the wrong gate but he told Lee "You'll have to do what you have to do." Lee took pictures of McDonald and the pickets standing next to the sign at gate A. (GC Exh. 7.)

20 Lee spent 3 or 4 hours on the site during which time he was told by the operator for Schindler Elevator, the union elevator contractor, that he would have to leave and remain off the site as long as the picket line was up. He also spoke with other contractors, including JC Two, to ensure that they understood the reserve gate system. While on the site Lee did not witness any infractions of the reserve gate system, nor were any reported to him.

25 Eattock testified that he was on the site from about 8 a.m. until 1 p.m. on December 21. When he arrived he saw two pickets standing and walking in front of gate A, wearing sandwich board signs. Eattock's office is adjacent to gate A and he did not observe any irregularities at gate A, nor were any reported. He testified that only 4 of the 35-40 unionized employees scheduled to work on December 21, actually worked.

30 McDonald testified that when he arrived at gate A on December 21, he met Macombe, the picket line captain. The time was between 6 and 6:15 a.m. He claims that there was no sign posted at gate A. McDonald met with the four union members and assigned two of them to picket each gate. McDonald estimates that the gate A sign was posted between 6:45 and 7 a.m. He admits that he read the sign and confirms that JC Two was not written on the sign. (Tr. 138-140.) He also states that the picture of

5 him and the two pickets standing next to the gate A sign was taken between 6:30 and 6:45 a.m. (Tr. 153). On cross-examination McDonald states that Lee took the pictures, and that they were taken before he and Lee spoke (Tr. 157). McDonald's statement on cross-examination contradicts what he said on direct examination. He stated on direct
10 that Lee drove up to gate A between 7 and 7:30 a.m. and that he was barely out of his car when he was screaming at McDonald that "he's not going to put up with this shit," and that "I'll fix this." (Tr. 148.) His testimony is further muddled by his acknowledgment that Lee was approaching as he spoke to McDonald (Tr. 158) but that he does not recall if the sign, which he admits he was standing next to in the pictures
15 (GC Exh. 7), was posted. He claims that his recollection is impaired because Lee was screaming at him. (Tr. 158, 162.) I note that no one was screaming at him when he testified that it was Lee who took the pictures and that he did so before they spoke.

20 McDonald said that Lee stated that "we don't have no right to be here, to be on the picket, to put this line here." To which McDonald replied, "we do" and "do what you got to do," after which Lee went to his office. A few minutes later five police cars arrived and the police spoke to McDonald. When testifying about his conversation with the police McDonald confirmed the testimony of the Charging Party's witnesses' that a guard was on duty at gate A (the guard can be seen at the far right of General Counsel
25 Exhibit 7(b)) and that gate A was locked. When asked by the Respondent's attorney the amount of time he spent at the site that morning McDonald said "I had a luncheon and I was out of there by 11:30" (Tr. 140). His office lunch was scheduled to begin at 11:30 a.m. in Atlantic City. Accordingly, he had to leave earlier than 11:30 a.m. In response to the question did he leave any instructions for the pickets, he says that he
30 told Macombe that "if anything changes I'll call you." McDonald claims that it was at the lunch that he learned, for the first time, of the Charging Party's letter outlining the reserve gate system.

35 Macombe is a retired union member who claims to have been on hundreds of picket lines. He testified that he arrived at gate A some time before 6:30 a.m. on December 21. Macombe said that he was certain that there was no sign on the gate.

40 Macombe said that he took notes during the picketing, but that he did not need his recollection refreshed because "there wasn't much happening on the first day. Nevertheless, he was given his notes and he identified them as his recopied notes of "what went on the first day we were there" (R. Exh. 1). His notes indicate that the picket line went up at 6:30 a.m. At 6:45 a.m. about 35 union trades men refused to cross the picket line. At 7:30 a.m. four painters crossed the line. At 8:45 a.m. all union trades left the site. The line came down at 2:30 p.m.

45 Regarding the four painters Macombe stated that it was an employee of a union contractor that alerted him to the men who were wearing "painter whites" and were accompanied by a female, as they walked by. The individual identified the female as the owner of the company. Macombe looked over and saw the painters passing
50 through the gate. Although Macombe stated that McDonald left the site at about 11:30 there is no evidence that he told McDonald that he saw the painters entering through gate A.

5 Macombe initially stated that he was not asked to leave or move while he was picketing. On cross-examination he stated that he did not remember (Tr. 128). He also stated that he did not remember Lee either speaking to him or talking to McDonald.

10 Macombe avers that he did not see the sign at gate A and he reaffirms his denial after being shown the picture of himself, McDonald, and Cobella, the other gate A picket. Macombe denies knowing Cobella's name. Macombe does remember McDonald telling him to take the line down at 2:30 p.m. and that the line is down until after the holidays.

15 *D. The Picketing on December 22*

Fray testified that when he arrived at 6:45 a.m. on December 22 the picket line was setup. He testified that the picketing began at around 6:45 a.m. with two pickets at each gate. Fray testified that the only person he recognized was McDonald. Eattock

20 testified that he arrived around 8 a.m. and saw the same picket at gate A as the day before. Both Fray and Eattock further testified that no union contractors worked on December 22, except for A.M.I. Construction. Fray testified that the picketing concluded at about noon.

25 McDonald denies being at the site on December 22. He admits that he is responsible for establishing picket lines and he denies that there was any picket line on the site on December 22.

30 III. LEGAL PRINCIPLES

[W]here a union makes an unqualified threat to a neutral general contractor to picket a jobsite where an offending primary employer would be working, and has reason to believe that persons other than the primary would be at work on the site, it has an affirmative obligation to qualify its threat by clearly indicating that

35 the picketing would conform to *Moore Dry Dock* standards or otherwise be in uniformity with Board law.

Teamsters Local 456 (Peckham Materials), 307 NLRB 612, 619 (1992) (citations omitted).

40 The Act draws a distinction between picketing directed at a primary employer—an employer with whom the union has a labor dispute—and picketing directed at neutral or secondary employers who have no dispute with the union in order to force those employers to stop doing business with the primary employer. Section 8(b)(4)(ii)(B)

45 “makes it unlawful for a labor organization or its agents to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring any person to cease doing business with any other person.” *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1191 fn. 6 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003) (quoting *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 fn. 11 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992)). In order

50 for the picketing to be unlawful, the secondary object need only be “an object”—not the

sole object—of the picketing. *Denver Building Trades Council v. NLRB*, 341 U.S. 675, 689 (1951).

The picketing here occurred on a construction jobsite, that was jointly occupied by the primary employer, JC Two, and by neutral employers, including Constanza. When analyzing union picketing at a “common situs,” the Board must give effect to the “dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.” *Denver Building*, supra at 692. To accommodate these often conflicting objectives, the Board established the following guidelines to help determine whether picketing at the common situs is lawful primary picketing or picketing with a proscribed secondary object:

[P]icketing . . . is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer’s premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Sailors’ Union of the Pacific (Moore Dry Dock), 92 NLRB 547, 549 (1950). Although failure to comply with one or more of the *Moore Dry Dock* standards does not constitute a per se violation of the Act, it creates a strong but rebuttable presumption that the picketing had an unlawful secondary object. See *Electrical Workers Local 332 (W.S.B. Electric)*, 269 NLRB 417, 421 (1984); accord: *Electrical Workers Local 970 (Interox America)*, 306 NLRB 54, 58 (1992).

The Supreme Court has approved the use of the reserve gate system as a means to isolate the situs of a dispute on a common worksite. See *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667 (1961). Under a reserve gate system, one entrance or gate is reserved for the exclusive use of the primary employer and its employees, suppliers, and customers, and the other gates are reserved for the exclusive use of neutral employers and their employees, suppliers, and customers. The purpose of the separate gate “is to permit lawful picketing that will be conducted so ‘as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.’” *NABET, Local 31 (CBS, Inc.)*, 237 NLRB 1370, 1375 (1978), *enfd.* 631 F.2d 944 (D.C. Cir. 1980) (overruled in part on other grounds *United Scenic Artists Local 829 (Theatre Techniques, Inc.)*, 267 NLRB 858 (1983) (quoting *Electrical Workers Local 640 (Timber Buildings, Inc.)*, 176 NLRB 150 (1969))). Use of a neutral gate by employees, suppliers, or other invitees of the primary employer may compromise the integrity of the gate, “which would result in destroying its immunity from primary picketing.” *CBS*, supra at 1375. “[O]ne or two such violations are insufficient to destroy the reserved gate system.” *Iron Workers Local 378 (McDevitt & Street)*, 298 NLRB 955, 959 (1991). “If the integrity of a reserved gate system has been maintained, and the primary employer or their employees or suppliers have not used or attempted to use one of the neutral gates, then picketing of the primary employer must be confined to the area reasonably

close to the reserved primary gate, and cannot be conducted at the neutral gates.”
 5 *Interlox America*, supra at 58. When a valid reserve gate system is in effect, picketing at
 a neutral gate violates *Moore Dry Dock* and therefore gives rise to a presumption that
 10 the union is pursuing an unlawful secondary objective. See *Electrical Workers Local 98*
(Telephone Man), 327 NLRB 593, 600 (1999); *Operating Engineers Local 150 (Harsco*
Corp.), 313 NLRB 659, 668 (1994), enf. 47 F.3d 218 (7th Cir. 1995); *W.S.B. Electric*,
 supra at 421; accord: *Interlox America*, supra at 59. If the union claims that it is
 15 picketing because the employer fails to meet area standards, wages, and benefits, the
 burden is on the union to establish that it has made reasonable inquiry to ascertain if its
 contentions are accurate. If the union fails to meet its burden the area standards
 picketing may be deemed pretextual, and evidence of improper motive found.
Operating Engineers Local 150 (All American), 296 NLRB 933 (1989). Having once
 picketed at a designated neutral gate, the burden is on the union to justify its disregard
 20 of the reserve gate system. *Operating Engineers Local 12 (McDevitt & Street)*, 286
 NLRB 1203, 1203–1204 (1987).

IV. DISCUSSION

25 The complaint alleges that on December 19, 2006, Kisielewski and McDonald
 threatened to picket the Lumberyards jobsite in violation of Section 8(b)(4)(i)(ii)(B) of the
 Act. Although the Respondent’s answer denies the allegation it made no effort to deny
 Eattock’s credible testimony regarding the threat at either the hearing or in its brief.
 Kisielewski did not testify and McDonald did not address this allegation in his testimony.

30 McDonald did address his conversation with Fray, and his testimony essentially
 admits that he made an unqualified threat to picket the site to Fray. Moreover, the
 Respondent does not contend otherwise in its brief. Based on the credited and
 undisputed testimony of Eattock and Fray, I find, that on December 19 shortly after
 Kisielewski and McDonald unsuccessfully sought the painting work that was assigned to
 35 JC Two, both men, during two separate conversations, made unqualified threats to
 picket the Lumberyards jobsite.

40 Accordingly, I find that the Respondent’s unqualified threat to picket the
 Lumberyards jobsite made by its admitted agents, Kisielewski and McDonald, violated
 Section 8(b)(4)(i)(ii)(B) of the Act, as alleged. E.g., *Electrical Workers Local 98 (MCF*
Services), 342 NLRB 740, 749–750 (2004); Contra: *United Association of Journeymen,*
Local 32 v. NLRB, 912 F.2d 1108, 1110 (9th Cir. 1990) (denying enf. of a Board order
 because the Board could not presume that a union’s threat to picket is unlawful when
 the picketing may be conducted in a lawful manner); accord: *Sheet Metal Workers’*
 45 *International Association, Local 15, AFL-CIO v. NLRB*, ---F.3d---, 2007 WL 1745321,
 182 LRRM 2009, 154 Lab. Cas. P 10,861 (DC Cir. 2007).

50 The Respondent opines that there is conflicting testimony as to when the gate
 signs were “posed” on the gates. In fact the record establishes that there is no issue
 regarding the sign attached to gate B on Collins Avenue. Fray’s credible testimony is
 that he attached the sign himself on either December 19 or 20, and the Respondent
 points to no credible record evidence to the contrary.

Regarding gate A, the neutral gate, the Respondent merely acknowledges that McDonald and Macombe contend that there was no sign at gate A when they arrived at the gate during the early morning hours of December 21. As will be seen the Respondent's reticence is understandable. There are significant contradictions between Macombe's and McDonald's testimony, McDonald's own testimonial inconsistencies, and the demonstrable inconsistencies between their statements and the testimony of other witnesses, and the photographic evidence.

McDonald avers that he is positive that the sign appeared on gate A sometime after the picket line went up. He claims that the sign was not up when he arrived at 6:15 a.m. The security guard is the only other person in the photograph (GC Exh. 7 (b)), of McDonald and the two pickets. There is no evidence that the photograph is not authentic or that it has been altered, and the Respondent does not argue otherwise. McDonald testified that picture was taken between 6:30 and 6:45 a.m. and that he read the sign. It is also evident by the way the men are focused on the photographer that there are no other distractions in the vicinity. The sign is clearly visible. Yet when asked if his testimony was that he did not see the sign McDonald answers, obliquely, that the sign was not there when he arrived in the morning. When asked if he knows when the sign was appended to gate A he states "No, I don't," (Tr. 162). Surely a 4-by-4 foot sign could not have been surreptitiously attached to the gate. Moreover, even assuming that the sign was attached during the 15-minute window between when the picket line went up and the photograph taken, McDonald made no mention of this to Macombe. Macombe was tasked as the Respondent's scribe, as well as the picket line captain. McDonald read the sign and presumably knew its significance. It would seem that he would want to memorialize when he first observed that the Charging Party was establishing a reserve gate system.

McDonald contradicts himself when testifying about the point in time that Lee took the pictures at gate A. He initially testifies that Lee got out his car screaming at McDonald, went inside his trailer, and shortly thereafter the police arrived (Tr. 148-151). He is then asked if he had anymore conversations with Lee, he twice answers "No." But he then claims that Lee came "back out with a camera taking pictures" (Tr. 152). When asked once again if he was certain that it was Lee or someone else, he answers that it was either Lee "or the other guy" (Tr. 152). He then states that he is "not too positive" who took the pictures. When asked about the time when the pictures were taken, McDonald responds 9 or 9:30. The only other pictures in evidence are pictures of the individual signs. Those pictures were taken during daylight hours in April and are clearly marked as such (GC Exhs. 5 and 6). I believe McDonald was attempting to identify those pictures, until council directed him to the pictures taken on December 21, and stressed to McDonald that "it's dark." McDonald replies "Well, I don't know about these pictures, I just know about the time that he'd come out, the other guys come out with a camera" (Tr. 153). His inability to recall the photographer is difficult to believe because in both pictures he and the pickets are looking directly at the photographer (GC Exh. 7). The three men in the picture do not appear to have had anyone recently screaming at them. Notwithstanding his failure, at that point, to be able to identify the photographer, McDonald still insists that the sign attached to the gate in the picture, was attached after the picket line went up, which he claims was between 6:30 and 7 a.m.

5 On cross-examination McDonald is asked if he recalls Lee taking the pictures on
the morning of December 21. He answered "Yeah, I remember some flashes going off."
When asked if the pictures were taken before or after Lee allegedly yelled at him, he
answers "before." (Tr. 157-158.) Thus, his testimony on cross-examination is
10 inconsistent with what he said on direct. On direct he claimed that Lee drove to the
gate between 7 and 7:30 a.m. (which is later than when he claims the pictures were
taken), and that Lee was screaming at him while he was getting out of his car.
McDonald never mentioned pictures or a camera during his initial testimony. It was not
until the police departed that McDonald claims that Lee, or other guys, came out of the
15 trailer and took pictures. Thus, it appears that McDonald is possibly confused about the
identity of the photographer. If he does believe that Lee is the photographer, he
appears confused about whether Lee took the pictures immediately after getting out of
his car, but before he started to scream at him, or if Lee came out later and took the
pictures. In any case McDonald attributes Lee's screaming as the reason he did not
20 notice the sign that is clearly visible in the picture of him and the pickets.

Macombe's testimony regarding the sign on gate A, although more consistent, is
no more credible than that of McDonald's. Notwithstanding Macombe's proximity to the
sign he insists that he did not see it until December 28. Notwithstanding, Macombe
25 staring directly at the camera, behind which Lee is standing, Macombe claims that he
does not remember ever seeing Lee before the hearing. His denial is contradicted by
Lee, who testified that he told Macombe he could not picket at gate A as he drove pass
him. And it also is inconsistent with McDonald's testimony about his dealings with Lee
at gate A.

30 Although some confusion might be expected from all witnesses, McDonald's
testimony is replete with contradictions and inconsistencies. He clearly is of the belief
that there is no reason to give a direct answer, if an indirect answer will suffice. One
example is his response to the question if he recalls Lee taking the pictures, he
35 responds "Yeah, I remember some flashes going off," (Tr. 157).

Based on my observations of Lee, I find McDonald's version of their encounter
implausible and incredible. Lee did not appear to have the demeanor of a person prone
to anger. Moreover, this was the first time Lee had met McDonald, increasing the
40 implausibility of McDonald's statement. Unlike McDonald and Macombe, I was
impressed by Lee's favorable testimonial demeanor. He appeared to be doing his best
to give an accurate and truthful account of what occurred. Accordingly, I fully credit
Lee's testimony that the sign on gate A was posted when he arrived at the gate on the
morning of December 21. I note that his testimony is consistent with and corroborated
45 by Fray. I find that Lee told Macombe that he was at the gate reserved for union
contractors. I find that Lee later told McDonald that a reserve gate system was
established and that he was picketing at the wrong gate. I also find that McDonald
corroborated Lee's testimony insofar that Lee told him that he was at the wrong gate
and that there was another gate.

50 McDonald's evasive and defensive response to questioning is best illustrated by
the colloquy between McDonald and the Charging Party's attorney concerning when
McDonald learned that the site had two gates (Tr. 168-171). The following exchange

5 occurs after Macombe's notes have been admitted—clearly indicating that there are two gates at the site, and Macombe has testified that he was aware of both gates because McDonald said “two men on this gate [gate A] and ‘I’m putting two men on the other gate,’” (Tr. 118). Even after admitting that Macombe acknowledges, both in his written
10 report and his testimony, the existence of a second gate, McDonald refuses to acknowledge that he knew that gate B was located on Collins Avenue. At one point he claims that he only learned the location of gate A from his boss, Peter Cipparulo. He claims that he assumed that there was a second gate when he dispatched the second pair of pickets to “go that way.” Later he says that he is not sure when he learned that
15 the gates were designated “A” and “B,” and that he was not sure if he even went to gate B on December 21.

A similar dialogue transpires over McDonald's alleged knowledge of the wages JC Two was paying its employees. Initially he denies making any inquiries because “we
20 already knew what the rates were.” When asked specifically if he knew that the Lumberyards was a prevailing rate project, he once again evades the question and replies “we already knew what their rates were.” He next responds that he knew what the rates were suppose to be. As counsel for the Charging Party continues to press for a response to this basic question McDonald retorts, “I don't understand what you're
25 getting at.” Eventually he comes full circle and states “we just know from past dealings,” and admits that he made no inquiries as to the JC Two pay rates.

Based on the foregoing I find that the Respondent failed to make any inquiry, let alone a “reasonable inquiry” concerning the wage rates paid by JC Two to its
30 employees working on the Lumberyards project. Accordingly, I conclude that the Respondent's purported area standards picketing was a pretext from which an inference of unlawful secondary motive may be found. E.g., *Carpenters Local 1622 (Iacono Structural Engineer)*, 250 NLRB 416 (1980).

35 All three of the General Counsel's witnesses, Lee, Eattock, and Fray exhibited impressive testimonial demeanor coupled with extremely thoughtful, detailed recollection of the events. Moreover, the testimony of the three witnesses is very similar. I have previously credited Lee's testimony that he told Macombe, and later McDonald, that they were picketing the wrong gate and that the reserve gate system
40 was established. I also credit Fray's testimony that he specifically told McDonald that he was picketing gate A and that they would have to picket the nonunion gate, which was B on Collins Avenue. I also find that McDonald told them that the pickets would remain where they were and that the Charging Party would have to do what it had to in order to get them to move from gate A.

45 The Respondent contends that because the letter notifying it that the Charging Party had established a reserve gate system was faxed after business hours, and not to the picket organizer, the pickets had not been notified of the reserve gate system until the afternoon of December 21. The fax notifying the Respondent of the reserve gate
50 system was transmitted at 7:29 p.m. on December 20. It was faxed to the attention of Kisielewski, the Respondent's business agent, at the Respondent's office in Glassboro. McDonald works in the same office. It is undisputed that Kisielewski was acting in his official capacity when, on December 19, he threatened Eattock that the Respondent

5 would picket the Lumberyards project. The fax was received at the Glassboro office by
at least 7:14 a.m., when an unidentified individual forwarded it to Peter Cipparulo at his
Springfield office. Cipparulo is Painters District Council 711 director of organizing and
McDonald's boss. I agree that the letter was not faxed during normal business hours on
10 December 20. I do find that the fax was received by the Respondent at least by 7:14
a.m. on December 21, when it was forwarded from the Respondent's Glassboro office
to Cipparulo. Accordingly, I also find that the information contained in the letter was
known to the Respondent by at least 7:14 a.m. on December 21.

15 The picket line most likely went up before 7:14 a.m. Based on the credited
testimony of Fray, however, he went to McDonald as soon as he saw that the men at
gate A had picket signs. Fray informed McDonald of the establishment of the reserve
gate system and told McDonald that he was at gate A and that he would have to picket
20 at the nonunion gate, which was B on Collins Avenue. Fray stated that McDonald's
response was that he was going to stay there and that the Charging Party would have
to do what they would have to do to move the pickets. Fray credibly testified that both
gate signs were hung by him on December 19 or 20 and that both were in place when
McDonald arrived, that gate A was locked, and that the security guard was at his post
and had been informed of his duties. Thus, the Respondent through McDonald, its
25 admitted agent, had notice of the Charging Party's reserve gate system before it began
to picket.

I also find that the Respondent's nonchalant response to receipt of the Charging
Party's notification that it had established a reserve gate system, is additional evidence
30 of its unlawful secondary intent. There was no attempt to convey the substance of the
Charging Party's letter to either McDonald or Kisielewski. Both men had gone to the
Lumberyards jobsite on December 19 and threatened to picket the site. McDonald
states that he was on the road and thus was unaware that the fax had arrived.
Kisielewski did not testify. It appears that no attempt was made to discover who in the
Respondent's Glassboro office forwarded the fax to Cipparulo, and why. Certainly
35 McDonald, the person who was in charge of instituting the picket line, should have kept
his office informed of his whereabouts and activities. If nothing else McDonald testified
that he was going to call Macombe from Atlantic City while Macombe was on the picket
line, thereby establishing that Macombe, at least, had a cell phone.

40 Cipparulo states that he received the fax between 8:45 and 9 a.m., shortly after
his office opened. Cipparulo had authorized area standards picketing at the jobsite,
based on a request by McDonald. Although Cipparulo testified that he was "quite
surprised" that the fax was addressed to Kisielewski, he took absolutely no action to
45 attempt to contact Kisielewski or McDonald. In fact Cipparulo apparently thought so
little of the substance of the letter that he decided to wait until he met McDonald at lunch
to tell him about it, and even then he did not bring the letter with him to show McDonald.

I find the Respondent's conduct after receipt of the Charging Party's notification
50 that it had established a reserve gate system supports an inference that it never
intended to abide by the reserve gate system. McDonald read the sign at gate A to
ensure that he was setting up the picket line at the correct gate—to enmesh neutral
employers. As Macombe stated "we put the line up early to catch them."

5 Accordingly, based on all the foregoing and the record as a whole, I find that the
Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing at the gate reserved
10 for neutrals at the Charging Party's Lumberyards project in Collingswood, New Jersey
on December 21.

15 The Respondent contends that its picketing of the neutral gate was justified
because the gate was tainted when the employees of JC Two entered the site through
gate A. The Respondent's contention is based solely on the statement of Macombe.
Macombe is the individual standing next to the gate A sign who testified that he did not
see that sign on December 21.

20 Macombe testified that has been a union member for 26 years. Macombe has
been retired for 7 years and during that time he has been a picket, picket line captain,
and observer hundreds of times for the Respondent. Macombe testified that he makes
notes of the things that happen while he is on picket duty. He indicated that he
understood the importance of his notes because he rewrites them to make sure they are
legible and he gives them to the union office for safe keeping and, apparently, to refresh
his recollection during unfair labor practice hearings. He identified his notes as "what
25 went on the first day we were there" (R. Exh. 4).

30 His notes for December 21 indicate that he reported at some unspecified time to
the Haddon Avenue entrance. He incorrectly identifies the "scab" as "T".C. Painting.
He writes that the line went up at 6:30 a.m. and that there were two gates and two
pickets at each gate. Thereafter, he has the following entries: 6:45 and 8:45 a.m.
indicate that the employees of the union contractors refuse to cross the picket line and
leave the site, 2:30 p.m. is when he closed the line down, and 7:30 a.m. is when four
"painters (scabs) crossed our line." Although Macombe felt it necessary to record the
weather conditions he does not identify the three other pickets by name or at which gate
35 the pickets were stationed; he does not mention that the picket line was photographed
by a management representative; he does not mention that five police cars arrived at
the site, and that McDonald spoke to the police; he does not mention that McDonald
spoke with the construction manager, Fray (or at least a management representative);
he does not mention that the project manager, Eattock (or at least a management
40 representative) crossed the picket line just before 8 a.m.; and he does not mention that
McDonald left the site at approximately 11:30 a.m.

45 Based on the contents of his notes, or more accurately the lack of content, I had
reservations concerning the thoroughness and probity of Macombe's note taking even
before he testified about the painters entering gate A. His testimony about that alleged
incident further damaged his credibility. Macombe was asked about two significant
events, the alleged tainting of the gate by the painters and if the picket line was up on
December 22. My sense when listening and observing him testify was that his
testimony was scripted, but that he did not have immediate recall of all his lines.

50 After several questions by the Respondent's counsel it was clear from
Macombe's testimony that four men dressed in painter whites walked up to the guard at
gate A who let them in. Counsel, however, was not satisfied and asked if they had any

5 equipment with them. Macombe responds with what sounds like a generic description
of painter jeans and the possible equipment they might carry. In the middle of his
statement he abruptly changes course and inexplicably starts the scenario from the
beginning. This time he provides that he was talking with two electricians, who were
10 waiting to see if they could cross the picket line. One says “Freddy, them 4 guys that
just went by, they’re the painters on the job. A matter of fact, that’s the girl. She’s the
owner of the company.” (Tr. 111.)

15 Both his demeanor and the inherent implausibility of the scenario leads me to
conclude that it did not occur. Macombe fails to explain why he had to be alerted to four
men in painter whites, and a women, going toward the one area on which his attention
should have been focused. He fails to explain why he did not record that the owner of
the company also crossed the picket line, or even mention that she did in his initial
version. It is significant that McDonald, who was still at gate A at that time, was not
20 asked to corroborate Macombe’s testimony. Nor was Cobella, Macombe’s fellow picket
at gate A, called to corroborate his account. I also note Macombe’s tendency to
prevaricate set out above, as well as his testimony that he did not see the sign on gate
A on which he was almost standing. Had the incident happened I would still be
disinclined to find that the reserve gate system was tainted. The record establishes that
25 the Charging Party took every reasonable precaution to ensure the integrity of the
reserve gate system, and I would not find that one instance of misuse would be
sufficient to destroy the reserve gate system. *Operating Engineers Local 18 (Dodge-
Ireland)*, 236 NLRB 199 (1978). Moreover, illegal picketing cannot be justified by after-
the-fact violations of the neutral gate by employees of a primary employer. *Nashville
Building Trades Council (H. E. Collins Co.)*, 172 NLRB 1138, 1139–1140 (1968) enf.
30 425 F.2d 385 (6th Cir. 1970). Further, there is no evidence that the Respondent’s
continued picketing at the neutral gate was in response to the alleged incident on which
it now relies. *Iron Workers Local 378 (McDevitt & Street)*, 298 NLRB 955, 959 (1990).

35 Macombe’s testimony regarding ingress and egress at gate A is also at odds with
the testimony of other, credited, witnesses. Thus, Macombe denies seeing anyone exit
through gate A while he was there. That statement is in conflict with Lee who testified
that he left the site between 10 and 11 a.m. and Eattock who testified that he left the
site at approximately 1 p.m. I also note, above, that Lee and Eattock parked and
40 entered through gate A. Macombe also denies that any vehicles crossed the picket line.
That statement is disputed by Fray who credibly testified that trucks were being
permitted and denied access through the gate (Tr. 81).

45 Macombe’s attempt to support the Respondent’s contention that it did not picket
the site at all on December 22, because the Respondent was closed for the holidays not
only fails, but it contradicts McDonald’s testimony concerning the incident. Macombe is
asked how long he left the line up on December 20 and he says 2:30. He is asked why
he left it up until 2:30 and he replies: “Ed McDonald had to go back to the union hall for
a luncheon so he told me ‘Freddy, take the line down at 2:30.’ So I said, ‘all right I’ll go
50 over and let the other two people know later.” Counsel asks if McDonald said anything
else and Macombe answers “No, he said as far as the line, the line is down until after
the holidays. Once again Macombe’s statements are disjointed and lack the ring of
truth. Macombe then states that he told the other two pickets that the line is dead until

5 after the holidays and he reaffirms this statement after council asks if he repeated, to the other people, what he was told by McDonald. And yet none of the other pickets testified.

10 When McDonald is asked if he left any instructions for the pickets before he left for his luncheon he answers "I told Freddy if anything changes I'll call you." "And I got a hold of him and told him to—after I talked to [Cipparulo] and he said to take it down in the afternoon." Several questions later counsel repeats the question about leaving instructions for Macombe and McDonald repeats his answer about taking the line down at 2:30. Counsel, perhaps recognizing that subtlety is not working, asks McDonald if he left Macombe with any instructions when it was going back up. McDonald answers "And it wasn't going to go back up until after the holidays." When asked if he told Freddy he replies "Yes, sir 'cause I didn't know nothing until I got to the luncheon. (Tr. 140-141.) Cipparulo supports McDonald's statements that it was he who told him to take the line down for the holidays. Aside from the fact that McDonald keeps saying that he "left instructions" with Macombe to take the line down when he testified that he later "called" Macombe there was only one other Freudian slip. McDonald responds "Take it down for the weekend—I mean for the holiday's" after being asked if Cipparulo told him to move the line to the right location or simply to take it down. Cipparulo admitted that he did not know for a fact that the picket line was not up on December 22. I find that Macombe and McDonald's testimony contrived and inconsistent with each other. Contrary to their exceedingly poor testimonial demeanor, Eattock and Fray both exhibited the demeanor of honest witnesses who also had excellent recall of the events. I fully credit their testimony that the Respondent picketed each gate on December 22 and the pickets were wearing the same signs. As a result of the picketing most of employees of the union contractors refused to cross the picket line.

35 The Respondent's final attempt to avoid an adverse ruling is that the Respondent's conduct at the neutral gate on December 21 does not fall under the legal definition of "picketing" because merely holding banners does not amount to "threat, coercion or restraint."

40 The photographs show the pickets at gate A standing, wearing sandwich board picket signs. Eattock credibly testified, without refutation, that he observed the pickets walking back and forth in the driveway of gate A (Tr. 59). In any case "[t]he important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employers business. *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965). The only "message" on the signs was that JC Two fails to meet area standards, a message I have found to be a pretext in order to disguise the Respondent's real motive for picketing which was to enmesh neutrals. Macombe testified that the picket line is put up "early to catch them [union members] so they [union members] don't cross the line," (Tr. 119).

50 The sandwich boards are tantamount to the traditional picket sign attached to a stick, and the pickets patrolled across the driveway at gate A. It is clear that this case does not involve bannering or leafleting and as such removes the Respondent's

conduct from the purview of *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Construction Trades Council*, (*DeBartolo II*), 485 U.S. 568, 571 (1988). Absent the protection elucidated in (*DeBartolo II*), the Respondent's argument fails.

Accordingly, based on the foregoing and the record as a whole I find, as alleged in the complaint that the Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by threatening to picket with the object of forcing Costanza, to cease doing business with JC Two and by picketing at gate A, a gate reserved for neutral employers.

CONCLUSIONS OF LAW

1. By unqualifiedly threatening to picket with the object of forcing Costanza Builders of New Jersey, Inc., to cease doing business with JC Two, Inc., at its Lumberyards jobsite in Collingswood, New Jersey, the Respondent, District Council 711, International Union of Painters and Allied Trades, AFL-CIO, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

2. By picketing and patrolling at the gate reserved for neutrals at the Lumberyards jobsite the Respondent has violated Section 8(b)(4)(i)(ii)(B) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, District Council 711, International Union of Painters and Allied Trades, AFL-CIO, Glassboro, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Unqualifiedly threatening to picket with the object of forcing Costanza Builders of New Jersey, Inc., to cease doing business with JC Two, Inc.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening, coercing, or restraining Costanza Builders of New Jersey, Inc., by picketing, where an object thereof is to force or require Costanza Builders of New Jersey, Inc., to cease doing business with JC Two, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Glassboro, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by Costanza Builders of New Jersey, Inc., and JC Two, Inc., if willing, at all places where their notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 4, 2007

John T. Clark
Administrative Law Judge

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT unqualifiedly threaten to picket with the object of forcing Costanza Builders of New Jersey, Inc. to cease doing business with JC Two, Inc.

WE WILL NOT, by picketing, threaten, coerce, or restrain Costanza Builders of New Jersey, Inc., with the object of forcing Costanza Builders of New Jersey, Inc., to cease doing business with JC Two, Inc.

District Council 711, International Union of
 Painters and Allied Trades, AFL-CIO

(Labor Organization)

Dated _____ By _____
 (Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor
 Philadelphia, Pennsylvania 19106-4404
 Hours: 8:30 a.m. to 5 p.m.
 215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.