

International Union of Operating Engineers, Local 12, AFL-CIO and Associated Engineers. Case 31-CC-1517

13 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 23 November 1982 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The Respondent excepts only to the broad Order recommended by the judge. The General Counsel excepts to the judge's failure to explain the basis on which a broad remedial order was recommended.¹ For the reasons set forth below, we agree with the General Counsel that the judge was warranted in recommending a broad order.

The charge in this proceeding, filed 14 April 1981 with complaint issuing 30 April 1981, alleged that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by certain picketing and other conduct in furtherance of a dispute with Associated Engineers. While this matter was pending, a complaint issued 8 October 1981 in *Operating Engineers Local 12 (Frank De Pietro & Sons)*, Case 31-CC-1570, alleging that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by engaging in picketing at a neutral gate during September 1981. On 4 March 1982 the cases were consolidat-

ed for hearing on the same day before the same administrative law judge.

Both cases were heard by the judge on 27 July 1982. On 30 September 1982 the judge issued his decision in *Frank De Pietro & Son*.² In his decision, the judge found that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing a neutral gate with an object of enmeshing neutral contractors in its dispute with a nonunion contractor and further recommended that a broad remedial order issue. The Respondent did not file timely exceptions to the judge's decision and, accordingly, the Board adopted the decision and recommended Order on 2 November 1982.³ Thereafter, the judge issued his decision in this proceeding.

We agree with the judge that a broad order is warranted in this case, since in our opinion the Respondent's conduct in the present case and its conduct in *Frank De Pietro & Sons* demonstrate a proclivity to violate the secondary boycott provisions of the Act.⁴ In so doing, we recognize that in the past the Board has held that an administrative law judge's decision to which no exceptions are filed may not be relied on to show a respondent's proclivity to violate the Act.⁵ However, we are not persuaded by the rationale advanced for treating such decisions differently from formal settlement agreements not containing a nonadmissions clause, which the Board has found may be considered when determining whether a respondent has demonstrated a proclivity to violate the Act.⁶ The mere fact that a formal settlement is formally reviewed and approved by the Board, and an administrative law judge's decision not excepted to is not, pales in significance when one considers that the latter is a fully litigated decision adopted by the Board as its own and the order contained therein has the same force and effect of a fully reviewed Board decision. As such, it may result in an enforcement or contempt proceeding just as any other Board order. While the lack of formal review

¹ JD-(SF)-265-82 (unpublished).

² On 6 December 1982 the Respondent requested permission to except to the broad Order. This request was denied as untimely 3 January 1983.

³ See, e.g., *Stage Employees Local 52 (Michael Levee Productions)*, 238 NLRB 19 (1978), enfd. 593 F.2d 197 (2d Cir. 1979); *Delaware Building Trades Council (Pettinaro Construction Co.)*, 230 NLRB 42 (1977).

⁴ See, e.g., *Tri-State Building Trades Council (Structures, Inc.)*, 257 NLRB 295 (1981); *Broadway Hospital*, 244 NLRB 341 (1979); *Elkwood Detective Agency*, 239 NLRB 99 (1978); *Plumbers Local 142 (Cross Construction Co.)*, 169 NLRB 840 (1968). In *Cross Construction*, the Board, noting that the respondent had "voluntarily" complied with a recommended order in an earlier case, merely held that a broad order based on "this single violation" was not warranted "[i]n the circumstances of this case." In later cases, the Board continued to apply this "rule" by rote until giving it a rationale, albeit perfunctory, in *Tri-State Building Trades Council*, supra.

⁵ See, e.g., *Teamsters Local 945 (Newark Disposal Service)*, 232 NLRB 1 (1977); *Carpenters (Lattanzio Enterprises)*, 206 NLRB 67 (1973), enfd. 499 F.2d 129 (9th Cir. 1974).

¹ The Charging Party excepts to the judge's failure to order the Respondent to publish the attached notice to employees in its newsletter, contending it is necessary to dispel the damaging effects of a previously published article in the newsletter. The prior article referred to the Respondent's efforts at "organizing the non-union survey companies" by setting up picket lines at jobsites and advised members that the "best rule for a union man or woman to follow is: 'I don't cross picket lines—period!' Do not work on a project on which a scab is working! No matter how many gates they have up—just leave." Although the article was not charged as a separate unfair labor practice, it was an obvious appeal to the Respondent's members to flout the Board's reserved-gate rules for common situs picketing and a part of the pattern of unlawful conduct which warrants a broad remedial order in this case. We believe publication of the notice is necessary to counteract the impact of the article and we therefore find merit in the Charging Party's exception. *Plumbers Local 403 (Pullman Power Products)*, 261 NLRB 257, 269-270 (1982), enfd. 710 F.2d 1418 (9th Cir. 1983).

may diminish or even negate the precedential value of the rationale in such a decision, there is no sound basis for treating such decisions as less than a formal determination of a respondent's culpability under the Act, a determination which may be considered when a propriety of a broad order is at issue in a subsequent case. Moreover, to permit a respondent to fully litigate a case and then avoid the consequences of repeated unfair labor practices merely by failing to except to an adverse decision by the judge would exalt form over substance.

Accordingly, we hereby overrule those decisions which hold that an administrative law judge's decision to which no exceptions are filed may not be considered by the Board when determining whether a respondent has demonstrated a proclivity to violate the Act. We therefore adopt the judge's recommended Order in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Union of Operating Engineers, Local 12, AFL-CIO, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Publish the attached notice in the next edition of its newsletter."

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Los Angeles, California, on July 27, 1982. The charge was filed by Associated Engineers (Associated) on April 14, 1981. The complaint issued on April 30, 1981, and alleges that International Union of Operating Engineers, Local 12, AFL-CIO (Respondent) violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (Act) on April 13 and 14, 1981, by certain picketing and related conduct in furtherance of a dispute with Associated.

I. JURISDICTION

Associated is a surveying and civil engineering firm located in Ontario, California. It annually performs services worth over \$50,000 for customers in California which meet the Board's direct inflow and/or outflow jurisdictional standards, and thus is a "person" and an "employer" within the pertinent sections of the Act, engaged in and affecting commerce within Section 2(6) and (7).

II. LABOR ORGANIZATION

Respondent is a labor organization within Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. Evidence

The project in question involved the regrading and paving of 16th Street in Upland, California. The jobsite was about 6000 feet long, east-west, and 60 to 70 feet wide. Associated, under contract with the City of Upland, began performing various surveying functions on March 31, 1981. Other contractors included Ace Pipeline, Barrett Construction Co., San Gabriel Water Co., and Southern California Gas Co.¹

It is established by the pleadings that, of these several contractors, Respondent had a dispute with only Associated at the times of the alleged misconduct. Associated had withdrawn the previous summer from the multiemployer association through which it had negotiated with Respondent, upon expiration of the association bargaining agreement. Its subsequent negotiations with Respondent, as one of several independents bargaining jointly, resulted in a strike in August 1980. Associated's surveying employees have not had union representation since.

Robert Dye, a business representative for Respondent, testified that Respondent "was having a good deal of problems with nonunion survey crews" at relevant times, and that he "had been asked to go to work on the problem." To that end, Dye admittedly had followed the truck of James Imborski, one of Associated's survey crew party chiefs, from time to time, to locate projects on which Associated was working.

On April 13, 1981, Dye entered the west end of the 16th Street project, his professed purpose being to conduct a "routine job check."² On his arrival, he came upon the foreman for Barrett Construction, Bill Douglas. He and Douglas were acquaintances, and Barrett was signatory to an agreement with Respondent. Dye mentioned that Respondent was having "some disputes with some survey employers" in the area, and asked if Douglas knew who was doing the surveying on that project. Douglas, replying that he was not "real sure," suggested that they "go see."

Dye and Douglas, in separate vehicles, drove east toward the surveying crew, which was working about midpoint on the tract. As they approached, Dye recognized the crew as Associated's. He and Douglas parked to the west of one of the survey crew's trucks and got out of their vehicles. Dye testified that he then told Douglas the crew's identity, and asked if Associated was performing under contract with Barrett. Barrett's agreement with Respondent forbade subcontracting to firms not signatory to an agreement with Respondent. Douglas answered, according to Dye, that he did not know, but was "going to check."

Douglas presently walked to the Associated truck, where Imborski, the crew's party chief, was seated inside. Douglas stated, according to Imborski, that Dye

¹ Each of whom is a "person engaged in commerce or in an industry affecting commerce" for purposes of Sec. 8(b)(4)(i) and (ii) (B).

² Dye testified, "We check jobs from time to time as far as union dues and proper referrals or clearances to those jobs." At pains to avert the impression that he had come to the site because of Associated's presence, Dye averred that he "just stumbled across the job."

had said Associated was nonunion and consequently wanted him, Douglas, "to kick [Associated] off the job." Imbiorski responded, so he related, that Douglas should tell Dye to "go to hell"; that Associated "had a contract with the city" and did not work for Dye.

Imbiorski next alit from the truck and heatedly confronted Dye, still standing near his car, face to face. Imbiorski assertedly declared that Associated "had a contract with the city" and had "every right" to be there, "possibly more of a right than" Dye had, with Dye countering that he had members "working on the job" and had "every right" to be there, too. Dye testified that Imbiorski said nothing about Associated's having a contract with the city, otherwise largely agreeing with Imbiorski's rendition. Dye stated that this incident "fired [him] up . . . [to] . . . find out what's going on" as concerned Associated's being on the job.

About the time of the encounters just described involving Imbiorski, Douglas, and Dye, all but one of Barrett's six or so employees, some operating heavy equipment several hundred feet away, shut down their pieces and stopped working. Moments later, leaving the site after his exchange with Imbiorski, Dye stopped and spoke with the remaining Barrett employee, operating a paddlewheel scraper, whereupon that employee stopped working as well.

Regarding the impetus behind the Barrett employees' stoppage, Imbiorski testified that, with the help of the rearview mirror on his truck, he saw Dye park at the left rear corner of the truck and, emerging from his car, wave his arm to one group of Barrett employees, then to another, prompting all but the scraper operator to gather around him at his car. Imbiorski's recital continued that he could not hear Dye's words to the employees, but that, having left his truck to deliver survey calculations to his instrument man, he heard one of the assembled employees ask, "So they are nonunion, what do you want us to do?" This all happened, according to Imbiorski, before his encounters with Douglas and then Dye.

Dye testified, on the other hand, that he and Douglas parked not near the Associated truck, but some 250 to 300 feet west of it; that he never made a "waving motion" to any of the Barrett employees; and that his only conversation with Barrett personnel, other than Douglas and, later, the scraper operator, was with a bulldozer operator named Fred. Dye recounted that Fred approached him just after his confrontation with Imbiorski, asking what was "going on." Dye answered, so he testified, that "a survey employer that had terminated his [labor] contract" was on the project, and that Dye was "trying to find out who he is working for." Dye testified that he could not remember if Barrett employees other than Fred approached him, and that he did not think others were present when he spoke to Fred.

Concerning his conversation with the scraper operator, Dye stated that, incidental to his asking to see the employee's union card and dispatch slip, the employee inquired about the "commotion" that had just taken place. Dye assertedly responded much as he had to Fred. Dye conceded that, given the scraper's distance from the so-called commotion and its operating noise, he did not

think the scraper operator could have heard his exchange with Imbiorski.

About 3:15, having learned about the stoppage, Barrett's president Ian Nascimento arrived at the site. The Barrett employees, still idle, explained to him that "the business agent had . . . shut the job down because of a . . . nonunion crew." They did not resume work that day. Normal quitting time was 3:30.

Later that afternoon, in his office, Dye received a call from a Barrett partner, Jim Scully, informing him that Associated was on the project pursuant to a contract with the city and not with Barrett. This, Dye averred, was his first information that Associated was not a Barrett subcontractor. Dye then discussed the situation by telephone with Respondent's business manager in Los Angeles, Bill Waggoner, who counseled that, since Associated was "working for the city . . . the only way that [Respondent] could picket . . . would be to picket for prevailing wages," provided that evidence could be obtained that Associated was paying below area standards.

That evening, Dye and other union officials spoke with two of Associated's 16th Street employees, Nick Rachael and Sean Carroll, professedly concluding as a result that Associated's pay indeed was substandard.³

About 7 o'clock the next morning, April 14, Dye and another union official, Tom Wadman, appeared outside the site, where they awaited the arrival of the Associated crew. When the Associated employees drove onto the project a few minutes later, Dye and Wadman followed in their cars, parking, in Dye's words, "as close as possible" to them when they parked. Once parked, Dye and Wadman left their cars, removing picket signs as they did so, and began walking around the Associated crew, signs in hand, singing a ditty about looking for the union label. Dye testified that he and Wadman picketed "as close as [they] could get" to the Associated employees "without stopping their work, or anybody else's work." Their signs stated:

**ASSOCIATED ENGINEERS UNFAIR
NOT PAYING PREVAILING WAGES
OPERATING ENGINEERS, LOCAL 12**

The Barrett employees, said by Dye to have been working at points "scattered all over" the site, shut down their equipment and left soon after the picketing onset. The employees of Ace Pipeline, San Gabriel Water Co., and Southern California Gas Co. also widely dispersed over the site, quickly followed suit. The Associated crew left the project at about noon. Picketing then ceased.

Imbiorski testified that, after Dye and Wadman removed the picket signs from their cars, they "raised up and waved them" over their heads while facing some of the Barrett employees. He stated that this lasted 5 or 10

³ The validity of this conclusion need not be passed upon. Respondent's president Robert Mills testified that the 16th Street project being in part federally funded, Associated endeavored to comply with the Davis-Bacon Act requirement that prevailing wages be paid. Mills stated that Associated used Respondent's standard area agreement as its guide in this respect.

seconds—"until the Barrett equipment ceased to work." Dye denied that he and Wadman waved the signs in this manner; and Nascimento, present at the time, testified that he could not recall seeing this.

Imborski also testified that, before the crews of the contractors other than Barrett stopped working, he saw employees of San Gabriel Water Co. and either Ace Pipeline or Southern California Gas Co. walk up to and have conversation with Dye as he picketed.⁴ Imborski did not purport to have heard what was said, Dye denied that these conversations occurred, denying as well that he or Wadman spoke to anyone at the site that morning. He elaborated, "We have been trained not to speak when we are carrying picket signs."

Those testifying were Imborski, Dye, Nascimento, and Robert Mills, Associated's president.

B. Conclusions

Credibility. Imborski is credited that Dye, on April 13, beckoned to the Barrett employees by arm motion, and that all but the scraper operator promptly shut down their machines and gathered around him. Not only was Imborski's testimonial demeanor more forthright and convincing than Dye's, but Dye's testimony was flawed by vagueness in certain critical respects—that he could not remember if Barrett employees other than Fred approached him, and that he did not think others were present when he spoke to Fred. Had there not been such a gathering, moreover, it is unlikely that the scraper operator, given his remoteness from the scene and the ambient equipment noise, would have seen or heard enough to wonder and ask Dye about the "commotion."

Dye's credibility suffered in a more general sense, as well. His statements that he "just stumbled across the job" on April 13, and was there to conduct a "routine job check," came across as schooled fabrications; and his denial that Imborski said anything to him about Associated's contract with the city, even though he would have us believe that he was acutely concerned whether Associated was a Barrett subcontractor in his preceding conversation with Douglas, and despite Douglas's having spoken with Imborski only moments earlier, was altogether implausible.

Imborski also is credited that Dye and Wadman "raised up and waved" the picket signs over their heads on April 14, until the Barrett employees shut down their equipment; and that employees of San Gabriel Water Co. and either Ace Pipeline or Southern California Gas Co. conversed with Dye, while he picketed, before the crews of those three firms stopped working. Again, Imborski's demeanor was the more impressive, and the other detractions from Dye's credibility, noted above, are relevant here as well as there. Nascimento's testimony that he could not recall seeing Dye and Wadman wave the signs over their heads was not meaningfully corroborative of Dye both because of its inconclusivity and because Nascimento throughout his testimony, in demeanor and con-

tent, gave the impression that he was walking on eggshells for fear of offending Respondent.

Law. To summarize the facts:

(a) Respondent had a dispute with Associated, but not with any of the other firms on the 16th Street project.

(b) On April 13, having located the Associated crew on the site, Dye made beckoning motions with his arm, whereupon all but one of the Barrett employees shut down their equipment, gathered around Dye for a time, and did not resume work that day.

(c) Soon after on April 13, Dye spoke to the remaining Barrett employee, the scraper operator, after which he likewise stopped working.

(d) On April 14, Dye and Wadman waved picket signs over their heads at the onset of picketing, whereupon the Barrett employees stopped working.

(e) Soon after on April 14, while picketing, Dye had conversations with employees of San Gabriel Water Co. and either Ace Pipeline or Southern California Gas Co., after which the crews of those three firms stopped working.

It is concluded that Dye's beckoning motions and ensuing remarks to the neutral Barrett's employees on April 13, including his remarks to the scraper operator and regardless of what he actually said, in each instance induced and encouraged those employees to stop working within clause (i) of Section 8(b)(4). The same conclusion is dictated as concerns the waving of the picket signs on April 14; Dye's conversations, while picketing, with employees of the two neutral firms other than Barrett; and the picketing in general, it being intertwined with the other (i) conduct that day. As the Supreme Court stated in *Electrical Workers IBEW Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 694, 701 (1951): "The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion."⁵

It is further concluded that, by their success, these acts of (i) inducement and encouragement perforce constituted coercion and restraint, within clause (ii) of Section 8(b)(4), against the neutral firms whose employees stopped working. *Plumbers Local 370 (Baughan Plumbing)*, 157 NLRB 20, 21 (1966).

It is concluded, finally, that even though Associated did not have a contractual relationship with any of the firms whose employees stopped working, Respondent's (i) and (ii) conduct had the requisite cease-doing-business object within subsection (B) of Section 8(b)(4). *Salem Building Trades Council (Cascade Employers Assn.)*, 163 NLRB 33, 35 (1967).

CONCLUSIONS OF LAW

Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act on April 13, 1981, when, in furtherance of a dispute with Associated, it effectively induced and encouraged employees of Barrett Construction Co. to stop working; and, on April 14, 1981, when, in furtherance of the same dispute, it effectively induced and encouraged

⁴ Explaining his uncertainty whether one of those to converse with Dye was an employee of Ace Pipeline or Southern California Gas Co., Imborski testified that the crews of the two "kind of work together sometimes," and thus "are kind of hard to tell [apart]."

⁵ See also *Electrical Workers IBEW Local 3 (L. M. Ericsson Telecommunications)*, 257 NLRB 1358, 1369 (1981); *Electrical Workers IBEW Local 3 (Diesel Construction)*, 205 NLRB 270 (1973); *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 NLRB 802, 812 (1949).

employees of Barrett Construction, Ace Pipeline, San Gabriel Water Co., and Southern California Gas Co. to stop working.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, International Union of Operating Engineers, Local 12, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services where an object thereof is to force or require that person or the City of Upland, California, to cease using, handling, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with Associated Engineers or any other person.

(b) Coercing or restraining any person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or to require that person or the city of Upland, California, to cease doing business with Associated Engineers or any other person.

2. Take this affirmative action.

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices

⁶ 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.

⁷ 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."

are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of the notice⁸ to the Regional Director for Region 31 for posting by Associated Engineers, Barrett Construction Co., Ace Pipeline, San Gabriel Water Co. and Southern California Gas Co., should they wish to do so, at all locations where notices to employees customarily are posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

⁸ Associated's request is denied that Respondent be required to publish the notice in its monthly News-Record.

APPENDIX

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

The trial held in Los Angeles, California, on July 27, 1982, in which we participated and had a chance to give evidence, resulted in a decision that we had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

WE WILL NOT in any matter prohibited by Section 8(b)(4)(i)(B) of the National Labor Relations Act induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to refuse to perform any other services, where an object thereof is to force or require that person, or the City of Upland, California, to cease doing business with Associated Engineers or any other person.

WE WILL NOT in any manner prohibited by Section 8(b)(4)(ii)(B) of the National Labor Relations Act coerce or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require that person, or the City of Upland, California, to cease doing business with Associated Engineers or any other person.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, AFL-CIO