

Local 150, International Union of Operating Engineers, AFL-CIO and Hamstra Builders, Inc.
Cases 25-CC-692 and 25-CC-692-2

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On February 26, 1991, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 150, International Union of Operating Engineers, AFL-CIO, shall take the action set forth in the Order.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge that the Respondent violated Sec. 8(b)(4)(i) and (ii)(B) of the Act, we find it unnecessary to rely, as the judge did, on evidence that about 20 picketers were stationed at the north gate, only 4 of whom carried signs.

John Petrison, Esq., for the General Counsel.
Bernard M. Mamet and Paul Berkowitz, Esqs., of Chicago, Illinois, for the Respondent.
J. Charles Sheerin, Esq., of Michigan City, Indiana, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. At issue is whether the Respondent, Operating Engineers Local 150 (the Union), violated Section 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by its picketing of the Strongbow construction site in Valparaiso, Indiana, on November 13 and 14, 1989. (All the events I refer to in this decision occurred in 1989, unless I specify otherwise.)

The Union has long had a primary dispute with Hamstra Builders, Inc.¹ Hamstra is in the construction business. Its employees are not represented by a union.²

The Strongbow construction site is located immediately south of Route 30 in Valparaiso. Wal-Mart planned to have a store on the site. The Wal-Mart store, in turn, was expected to be one of many on the site. Wal-Mart contracted with Hamstra to build the store. Hamstra began its work at the site on November 13.

During the period in question there were two vehicular entrances onto the site. One led onto the site from Route 30. That was at the northern edge of the site and, naturally enough, was called the "north gate." The other entrance was near the southwest corner of the site. Penna Hill Road dead-ended at the site there. Everyone called that entrance the "south gate."

The Signs at the Gates

Three Hamstra employees and Hamstra's project superintendent arrived at the site before 7 a.m. on November 13. The first thing they did was erect a sign at the north gate that read:

This gate is reserved for the exclusive use of the employees and suppliers of the following named businesses:

Hamstra Builders, Inc.

All other employees or suppliers are to use the South Gate.

The Hamstra crew next erected a sign at the south gate. It read:

This entrance may not be used by employees and suppliers of:

Hamstra Builders, Inc.

All other persons may use this entrance.

With the sign-erecting completed by about 8 a.m., the Hamstra crew began their work at the Wal-Mart site.

The Picketing

The Union had long known that Hamstra would be engaged in construction at the site (from published reports). Union Business Representative James Parker arrived at the site about 6:30 a.m. on November 13 and shortly thereafter confirmed that Hamstra employees were working there. (The Union admits that Parker is its agent.) Parker called Local 150's union hall, asking for some picketers.

The picketers arrived at about 10 a.m. Parker stationed them at both the north and south gates even though he was aware of the reserved gate system that had been established. (Parker's stated reason for picketing the south gate as well as the north: he saw a Hamstra truck drive onto the site through the south gate. I will discuss that "taint" in the following part of this decision.) The picket signs read:

¹The Union admits that Hamstra is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and that at all times material the Union has been engaged in a labor dispute with Hamstra.

²Hamstra filed its charge on November 14, 1989. (The charges in CC-692 and CC-692-2 are identical. One was transmitted to Region 25 electronically, the other by mail.) The complaint issued on December 26. The complaint was amended at the hearing which I held in Valparaiso on August 7, 1990.

Notice to the public. Hamstra Builders does not pay the prevailing wages and economical [sic] benefits for Operating Engineers which are standard in the area.

Our dispute means only the [sic] substandard wages and benefits paid by this company.

Local 150, Operating Engineers

The picketers patrolled the two gates until about 2:30 p.m. on November 13. They returned (to both gates) at 6:30 a.m. on November 14 and picketed until about 2:45 p.m. that day. The Union did not further picket the site.

Did Hamstra or its Suppliers Use the South Gate?

Parker's claim that a Hamstra vehicle used the south gate. Parker testified that he and another member of Local 150 saw a red 1-1/2-ton stake truck, with "Hamstra" painted on it, enter the site via the south gate at about 9:30 a.m.

Hamstra does operate a number of red 1-1/2-ton stake trucks that bear the "Hamstra" insignia. In fact Hamstra's superintendent for the Valparaiso site, Elmer Vandermolen, did drive just such a truck onto the site on November 13. But Vandermolen, along with another Hamstra supervisor and two Hamstra employees, all testified (with varying degrees of specificity) that Vandermolen's truck was the only Hamstra truck to enter the site on November 13, that it entered the site before the signs were erected, and that it entered the site via the north gate.

I credit the Hamstra witnesses, not Parker, and find that no vehicle owned or operated by Hamstra or any of its personnel entered the site via the south gate on November 13. I therefore further find that the south gate was untainted at the time the Union began picketing the south gate.

The use of the south gate by a Hamstra supplier. Hamstra witnesses testified that prior to erecting the signs at the two gates the company advised its suppliers to use the north gate when entering or leaving the site. But Hamstra did not police either gate. And Hamstra personnel working at the Wal-Mart site could not easily keep an eye on the south gate.

Earl Hurd is the business manager of a union allied with Local 150. He stopped by the site—at the south gate—just before noon on November 13. Parker wasn't around at the time. According to Hurd's testimony, a tractor-trailer bearing a "Lakeside" insignia entered the site via the south gate. Hurd talked to the driver and learned that the truck was hauling a load of masonry sand for Hamstra. Hurd testified that the truck did not unload. Instead the driver drove directly to the north gate and left the site.

Hamstra personnel testified that, to their knowledge, no Hamstra supplier used the south gate. Hamstra personnel further testified that a company called "Lakeshore Brick and Block" (as opposed to *Lakeside*) was supposed to deliver some masonry sand on November 14; but it never completed the delivery because, according to information that Hamstra received from Lakeshore, the driver refused to cross the picket line.

I find that, at a few minutes before noon on November 13, a Lakeshore Brick and Block truck, carrying supplies for Hamstra, did enter the site via the south gate, but that because of the pickets at the gate and because of the driver's conversation with Hurd, the truck exited the north gate without completing the delivery.

The Impact of the Picketing on Neutral Employers

The amended complaint alleges that the Union's picketing "has induced and encouraged" individuals employed by Smith Southeast, Wal-Mart, and Warner & Sons Construction Company, and other persons, to strike or otherwise to refuse, in the course of their employment, "to use . . . or work on any goods . . . or to perform services, and has coerced and restrained Smith Southeast, Warner . . . and Wal-Mart, employers, and other persons engaged in commerce."

Warner's departure. Smith Southeast is the developer of the Strongbow project. Warner & Sons Construction Company is in the excavating business. Warner's employees are represented by Local 150. Smith Southeast contracted with Warner to prepare the entire site for construction—including the Wal-Mart site. As of November 13 Warner had completed almost all of the excavation work for the Wal-Mart building and was in the midst of work on another part of the site.

While Hamstra's progress on the Wal-Mart site depended upon Warner completing that excavating work, Hamstra had no contractual relationship with Warner. (Warner did its work under contract with Smith Southeast. Wal-Mart's relationship was with Smith Southeast. Hamstra contracted with Wal-Mart.)

On November 13 a crew of Warner employees was working at the site, but not in the Wal-Mart area. Early in the morning one of the Warner employees asked a Hamstra employee if the Hamstra employees were unionized. The Hamstra employee said that they were not. Soon after the Union's pickets arrived, the Warner employees left the site (via the south gate). Vandermolen (the Hamstra supervisor) testified that he did not see Warner employees on the Strongbow site after November 13 and that he did subsequently see another excavating company at work on the site. Parker (the Union's business representative) denied that he asked the Warner employees to leave the site.

In sum, there is no evidence in the record specifying why the Warner employees left the site. Perhaps their departure had to do with the picketing, perhaps not.

Other impacts on neutral employers. Hamstra was Wal-Mart's general contractor for the construction of the Wal-Mart building on the site. Hamstra had not scheduled any subcontractors to work on the site on November 13 or 14. Thus, the picketing did not keep employees of Hamstra's subcontractors away from the site or otherwise interfere with the work of those subcontractors.

There is nothing specific in the record about whether other (non-Wal-Mart) parts of the site were supposed to be worked on on either November 13 or 14—apart from Warner's excavating work. Thus, there is no evidence that employees who were supposed to be working on those parts of the site stayed away because of the picketing.

Did the Union Violate Section 8(b)(4)?

The period between the start of the picketing and noon on November 13. Hamstra set up a two-gate reserved gate system. The Union, whose dispute was with Hamstra, knew about the two gates, knew that the south gate was reserved for neutrals, yet picketed the south gate as well as the north.

That makes out a prima facie violation of Section 8(b)(4)(i) and (ii)(B). E.g., *Iron Workers Local 433 (Chris Crane)*, 288 NLRB 717 (1988).

Had the Union been able to show that Hamstra employees or suppliers used the south gate, the Union would have thereby overcome that prima facie case. *Id.* But as discussed above, the record fails to show that any Hamstra employee or supplier used the south gate before or during the first hours of the picketing.³

Similarly, a different situation would obtain if the Union had been able to show that the reason that Hamstra chose the north gate as the gate that its employees and suppliers were to use was to render the Union's picketing ineffective. See *Carpenters Local 33 (CB Construction)*, 289 NLRB 528 (1988), *enfd.* 873 F.2d 316, 319 (D.C. Cir. 1989). But the evidence shows the contrary. The north gate, next to heavily travelled Route 30, was readily visible to the public. The south gate, on the other hand, was at the dead end of a road that served nothing but two or three farms (apart from the construction site). Thus, the difference in the relative visibility to the public of the two gates—with the north gate much more visible than the south gate—is further evidence that the Union's object in picketing the site was something other than informing the public of Hamstra's below par remuneration of its employees.

The Union vociferously argues that the evidence shows that the picketing had no impact on any neutral employers or their employees.

Actually, the record does not permit any determination about whether the picketing had any impact on any neutral or its employees. But all of that is beside the point. The Union, without justification, picketed the gate reserved for neutrals, and it obviously did so for a reason other than advising the public of Hamstra's substandard wages and benefits. That adds up to a violation of Section 8(b)(4)(i) and (ii)(B). No actual impact on neutrals need be proven. E.g., *Carpenters Local 33 v. NLRB*, 873 F.2d 316, 322 (D.C. Cir. 1989).

The period commencing about noon on November 13. A Lakeshore Brick and Block truck, carrying supplies for Hamstra, did enter the site via the south gate a few minutes before noon on November 13. But by then the Union's picketers had been patrolling the south gate for about 2 hours. Moreover the union agent who called for the picketers, Parker, was not aware of that tainting.

Since the Union obviously did not commence its picketing in response to the use of the south gate by the Lake Shore Brick and Block truck, and since there is no showing that the Union would have halted its picketing sooner but for that truck's use of the south gate, that tainting is irrelevant: *Operating Engineers Local 12 (McDevitt & Street)*, 286 NLRB 1203 (1987).

³ A truck not belonging to Hamstra, but similar in appearance to Hamstra vehicles, was on the site on November 13. Perhaps it entered the site via the south gate. Thus, there is some possibility that a union agent mistakenly thought that a Hamstra truck used the south gate. But I do not find that the Union carried the burden of showing that any of its agents believed in good faith that, in the first hours of the picketing, there had been any tainting of the south gate. And see *Carpenters Local 33 v. NLRB*, 873 F.2d 316, 322 (D.C. Cir. 1989).

Other Matters

The Union makes much of the fact that Hamstra did not notify the Union of its plan to set up a reserved gate system. But that lack of notification did not mislead or confuse the Union. At the time Parker called for the picketers he knew very well that Hamstra had set up a reserved gate system, and he knew which gate was reserved for which entities.

The Union argues that any violation by it of the Act was for such a short time and had so little impact that the case against it should be dismissed on de minimis grounds. The Union cites, in that respect, *Laborers Local 1290 (Walters Foundation)*, 195 NLRB 370, 371 (1972). But the Board's focus in that case was on actions by the employer that understandably confused the Union, not on the brevity of the Union's violation.

The General Counsel argues that the Union really did not know that Hamstra's wages or benefits were less favorable than area standards and that this lack of knowledge is further evidence of the Union's unlawful objective. But the record shows that the Union conducted enough of an investigation to reasonably satisfy itself that Hamstra was not meeting area standards in the remuneration of its employees. Moreover neither the General Counsel nor Hamstra sought to introduce evidence showing that Hamstra's wages and benefits did meet area standards.

Finally, the General Counsel points out that the Union stationed about 20 picketers at the north gate, only about four of whom carried signs. (The record does not tell us how many picketers were at the south gate.) The General Counsel argues that using that many picketers "indicates that there was an intent on the part of the Respondent to do more than merely communicate to the public of [Hamstra's] failure to pay area standard wages." (Br. at 7.) I agree.

CONCLUSIONS OF LAW

1. Hamstra Builders, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 150, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Local 150, International Union of Operating Engineers, AFL-CIO has not been certified under the provisions of Section 9 of the Act as the representative of the employees of Hamstra Builders, Inc.

4. By inducing and encouraging individuals employed by persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use or work on any goods or materials or to perform services, and by threatening, coercing, and restraining persons engaged in commerce, or in an industry affecting commerce, with an object of forcing or requiring those persons to cease doing business with Hamstra Builders, Inc., Local 150, International Union of Operating Engineers, AFL-CIO, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent, Local 150, International Union of Operating Engineers, AFL-CIO, has vio-

lated Section 8(b)(4)(i) and (ii)(B) of the Act, the accompanying recommended order requires it 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 recommended⁴

ORDER

The Respondent, Local 150, International Union of Operating Engineers, 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 employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is to force or require any person engaged in commerce, or in an industry affecting commerce, to cease doing business with, Hamstra Builders, Inc.

(b) In any manner threatening, coercing, or restraining any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require any person to cease doing business with Hamstra Builders, Inc.

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

(a) Post at its office and meeting halls copies of the notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted.

⁴If 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.

⁵If 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."

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Deliver to the Regional Director for Region 25 signed copies of the notice in sufficient number for posting by Hamstra Builders, Inc., Smith Southeast, Wal-Mart, Warner & Sons Construction Company, and any other employer that was engaged in construction at the Strongbow construction site on November 13 or 14, 1989, if such employers are willing, at all places where notices to employees are customarily posted.

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

APPENDIX

NOTICE TO EMPLOYEES AND 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in or induce or encourage any individual employed by any person engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of his or her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any person engaged in commerce, or in an industry affecting commerce, to cease doing business with Hamstra Builders, Inc.

WE WILL NOT threaten, coerce, or restrain any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require any person engaged to cease doing business with, Hamstra Builders, Inc.

LOCAL 150, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO