

Carpenters Union Local 180, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Carpenters Union Local 751, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Northern California Carpenters Regional Council and Condiotti Enterprises, Inc.
Case 20-CB-10602

July 20, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On May 19, 1998, Administrative Law Judge Joan Wieder issued the attached decision. The Respondents Carpenters Local 180 and Carpenters Local 751 filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party 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,¹ and conclusions, and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondents, Carpenters Union Local 180, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Vallejo, California; Carpenters Union Local 751, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Santa Rosa, California; and Northern California Carpenters Regional Council, Oakland, California, their officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(b).

“(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

Kathleen Schneider, Esq., for the Acting General Counsel.
Sandra Benson, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Respondents.
George Allen, Business Representative, of Novato, California, for the Charging Party.

¹ To the extent that the Respondents have excepted to some of the judge's credibility findings, we have carefully examined the record and find no basis for reversing the 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), enf'd. 188 F.2d 362 (3d Cir. 1951).

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on March 12 and 30, 1998,¹ at San Francisco, California. The charge was filed by Condiotti Enterprises, Inc. (Condiotti or the Charging Party), on August 4, against Carpenters Union Local 180, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 180); Carpenters Union Local 751, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 751); and Northern California Carpenters Regional Council (Regional Counsel), collectively referred to as Respondents. The Regional Director for Region 20 issued a complaint and notice of hearing on November 26, which was amended on February 5, 1998, and at the hearing, alleging Respondents violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by threatening employees with the loss of existing health, welfare, pension, and other benefits because they exercised their statutory right to resign from one or more Respondents.

Respondents' timely filed answers to the complaint, as amended, admit certain allegations, deny others, and deny any wrongdoing. Respondents assert they truthfully informed the employees of the consequences of their decision to resign from Local 180 and/or Local 751, and move the complaint be dismissed. I find the facts of this case require the motion is denied.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record,² from my observation of the demeanor of the witnesses, and having considered Respondents' oral argument and the General Counsel's and the Charging Party's posthearing briefs, I make the following³

FINDINGS OF FACT

I. JURISDICTION

Based on the Respondents' answers to the complaint, as amended, and the parties stipulations at hearing, I find Condiotti meets one of the Board's jurisdictional standards, and the Respondents are statutory labor organizations.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Condiotti is engaged in the building and retail sale of homes. Condiotti and one or more of the Respondents have been in a collective-bargaining relationship for approximately 35 years. The last collective-bargaining agreement expired June 15. Re-

¹ All dates are in 1997 unless otherwise indicated.

² Counsel for the Acting General Counsel moved to correct the transcript particularly a portion on p. 65 of the transcript. Counsel for Respondent opposed the correction and agreed to accept whatever ruling I make after listening to the tape recording of that page. After listening to the tape, I find LL. 14-17 should read as follows:

A. Well, they just told us, “well, you're going to lose all of your benefits, what you have, and they started with our pension and annuity and vacation and all the things that the union has. [The quote was not closed in the corrected sheet prepared by the reporting service.]

The tape of the testimony was very clear and there is no reason to doubt the accuracy of the correction. Accordingly, I grant the motion to amend the transcript.

³ I specifically discredit any testimony insistent with my findings.

spondents and Condiotti were unsuccessful in reaching a new collective-bargaining agreement. Sometime prior to June 29, Condiotti circulated to some of its employees an open letter announcing they would no longer be union home builders because of competitive considerations. The missive informed the employees Condiotti would continue to operate under the collective-bargaining agreement until June 29, then on June 30, “we will begin working under our own terms and conditions.”

After inviting their carpenters to continue working for Condiotti, the letter further informed the employees:

We will continue to offer the same piece rates we have been paying. We will also purchase a medical insurance plan comparable to plans available in the rest of the industry. We will not have a pension plan or any other multiple plans we are now paying into. We regret we cannot continue to make payments into your pension plan. Although your account will not grow, the Union cannot take your retirement benefits away from you, provided you are presently vested. Vested retirement benefits are protected by law.

By July 2 Condiotti employed about 15 carpenters all of whom engaged in a work stoppage and walked off the job. Three of these employees returned to work for Condiotti. Joel Calderon, his brother Elisea Calderon and Gary Anglin.⁴ Joel and Elisea Calderon and Anglin resigned from the Unions and Condiotti operates as a nonunion contractor.

After the strike Respondents’ representative Dan Digardi and Dennis Schager, as well as others, went to the worksites and spoke to Condiotti’s employees. Dan Digardi and Dennis Schager,⁵ spoke with Joel and Eliseo Calderon about their resignations, continued employment with Condiotti and their benefits. Respondents claim Schager and Digardi were addressing Condiotti’s letter to employees and insuring those who continued working for Condiotti correctly understood the impact of their resigning from the Unions upon their benefits. This claim was not supported by any objective evidence. Digardi and Schager did not appear and testify nor did any other representative of Respondents.

B. Events of July 8 and 9

Joel and Eliseo Calderon had a conversation with Digardi and Schager while they were working at the Farmington jobsite. According to Joel Calderon, Digardi did most of the talking and said:

He wanted us to leave our job because Condiotti didn’t reach an agreement with the union. And that’s mostly what he wanted us to get off the job. . . . He told us the worst thing, we were going to lose our benefits and stuff like that. . . . He didn’t really say what benefits, he just said “benefits.” He said, “You’re going to lose all of your benefits if you stay with Condiotti. . . .” That he could get us a job it we wanted to, a union job.

The next day, Joel and Eliseo Calderon had another conversation with Digardi and Schager. During this conversation, according to Joel Calderon, Digardi and Schager informed them “You’re going to lose our benefits, but they never said what or

nothing.” Joel Calderon’s union pension is vested and Eliseo Calderon’s union pension is not vested. At the time of these conversations neither Joel nor Eliseo Calderon was a member of Respondent.

Eliseo Calderon recalled the July 8 conversation with Digardi and Schager as follows:

Well, most—Dan Digardi was the one who was doing most of the talking. And he just briefly told us that we were doing the wrong thing for working for Condiotti, since Condiotti wasn’t a union member no more. And that we would lose more in the long run than gain more—or receive from Condiotti. . . .

Well, they just told us, “Well, you’re going to lose all of your benefits, what you have and they started with our pension and annuity and vacation and all the things that the union has.”

Eliseo Calderon specially recalled Digardi and Schager mentioning pension and annuity benefits. Digardi and Schager did not ask Joe and Eliseo Calderon if their benefits were vested. Eliseo Calderon also recalled Digardi informed them they would lose more in the long run than they would gain.

Duard Lee, a former superintendent for Condiotti, overheard a portion of Digardi’s and Schager’s July 8 conversation with Joel and Eliseo Calderon. According to Lee, Digardi informed the Calderons.

If they didn’t rejoin the union that they were gonna lose their benefits totally. Eliseo didn’t have his full 10 years in and Joel did and they stated that to them—to Digardi and he said it didn’t matter. They were still going to lose them.

Now to regain those back, we will give you that back if you will re-sign with the union, and if you re-sign with the union, we will sign you back up without any cost to you. You can just sign up and it’s a free ride back into the union. In addition to that we have work for you. We can put you to work instantly.

Lee did not recall pension benefits being specifically mentioned by Digardi and Schager, but he was unsure. He mentioned pensions in an affidavit which he claimed was made at a time his recall was better. Lee also could not recall if Digardi and/or Schager mentioned annuities during either the July 8 or 9 conversations.

Lee also recalled a conversation with Digardi and Schager on July 9. During that conversation Digardi “again threatened them with losing, in my words, benefits moneys and medical and we can give you a job instantly. You shouldn’t be working for these people. They’re treating you like trash.” Lee was sure Joel and Eliseo Calderon understood their union benefits. Their absences were unexplained. The Charging Party notes the failure to call witness “who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.” *Douglas Aircraft Co.*, 308 NLRB 1217 (1992). Citing also *Internal Automated Machinists*, 285 NLRB 1122 (1987); *SDC Investment, Inc.*, 299 NLRB 779 (1980), *Basin Frozen Foods*, 307 NLRB 1406 (1992); and *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966 (D.C. Cir. 1988). Even absent any adverse inferences, the record supports my conclusion Respondents violated Section 8(b)(1)(A) of the Act.

⁴ Anglin is an admitted supervisor and the allegations concerning comments made to him by Respondents’ representatives were withdrawn from the amended complaint.

⁵ Respondents admit for the purposes of these proceedings Digardi and Schager are agents of all the Respondents.

Counsel for the General Counsel attempted to resolve the differences in Joel and Eliseo Calderon's testimony by adducing the testimony of George Allen and Duard Lee. Allen has been employed by Condiotti for about 25 years and is currently Vice President. On July 9, Allen overheard Digard and Schager telling "Anglin⁶ that he would lose his benefits if he continued to work there. He had—he and the Calderon brothers had withdrawn from the Unions and returned to work for us."⁷ Allen readily admitted Condiotti did not like the unions' representatives at the jobsite interrupting their employees work. The Unions obtained a court order permitting their presence under terms and conditions which were not fully specified in this record.

Anglin, a current supervisory employee of Condiotti, recalled the conversation with Digardi and Schager as follows:

Dan told me he was disappointed that I had dropped out of the union or withdrawn from the union and stayed with Condiotti. Dennis chimed in with that. "You know you stand to lose everything that you ever gained. You're going to lose your benefits, you know. We can lock up your pension. We can lock up your annuity. You're going to lose all of your health and dental benefits."

Anglin informed Digardi and Schager he thought they were wrong because his pension had vested and he understood his annuity was like a savings account which they "couldn't lock up."⁸ It was at this point Allen joined the conversation. Anglin recalled Digardi admitting he may have misspoken, saying that he was not a lawyer.

Anglin also had a conversation with Digardi and Schager on July 8, but was not sure they also mentioned loss of his benefits during that conversation. Schager at some point informed Anglin "I had already lost my health and welfare coverage. . . . They had seen to that, he said." Anglin eventually received a letter from the trust fund office informing him his health and welfare benefits were terminated.

Gene Price, the Deputy Administrator of the Carpenter funds Administrative Office (Trust Funds) testified the Trust Funds cannot take any action which violates their governing documents and it is separate and distinct from Respondents. Health and welfare benefits are canceled when an individual works for a nonsignatory, noncontributing employer. Joel and Eliseo Calderon and Anglin had their hours banks canceled. There is no

no claim this action or any other actions by the Trust Funds, were improper. Concerning the pension rules, if an individual's benefits are not vested and they work for a nonunion, noncontributing employer or have another break in service, they would lose their previous pension credit. A break in service can be repaired by working for the contributing employer the number of hours specified in the plan. Of the three employees who resigned from the Union and returned to work for Condiotti, only Eliseo Calderon did not have vested pension benefits.

Joel Calderon and Anglin would have lower benefits than similarly placed individuals who continued to work for union employers because they are not continuing to make contributions. Moreover, they lose other pension benefits, a disability pension and a preretirement death benefit. Moreover for every quarter a vested individual works for a noncovered employer, his service pension or early retirement pension is delayed by 6 months. Price explained the annuity plan as follows:

In order to be entitled to receive money out of the annuity plan, the individual had to be retired. And the rules of the plan defines what being "retired" is. And included in that is to have had zero hours of noncovered employment within the past two years.

So an individual who continues to work for a non-union contractor in the construction industry would not be able to withdraw his annuity as long as he continues to work in that industry.

Price did not testify the statements made to the Calderons by Digardi and Schager were accurate or truthful predictions of actions the Trust Funds were mandated to take under their governing documents.

III. ANALYSIS AND DISCUSSION

The issue is whether Respondents' agents, Digardi and Schager, were engaged in protected speech or unlawfully restraining Joel and Eliseo Calderon from exercising their Section 7 right to refrain from concerted protected activity. In determining whether Respondents agents statements on July 8 and 9 reasonably tended to coerce or intimidate Joel and Eliseo Calderon in the exercise of their rights, as protected by the Act, all the surrounding circumstances are to be examined. An employee's right to resign from a union is protected under the Act, as is their right to then cross a union's picket line to work for an employer, without fear of improper reprisal for engaging in this protected conduct. *NLRB v. Textile Workers*, 409 U.S. 213 (1972); *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *Auto Workers Local 449 v. NLRB*, 865 F.2d 28 (3d Cir. 1989). I find the General Counsel has made a prima facie showing Respondents' messages were reasonably calculated to coerce employees from exercising rights protected by the Act.

Respondents, citing *NLRB v. Laborers Local 534*, 778 F.2d 284 (6th Cir. 1985), argue the statements of Digardi and Schager were not coercive, rather they were merely correct predictions of the action of a third party, the Trust Funds, will take as a natural consequence of Joel and Eliseo Calderon's withdrawal from the Union and working for a nonsignatory employer, not because of any instigation or assistance from Respondents.

Respondents further argue its agents' statements were merely lawful attempts at persuading Joel and Eliseo Calderon to rejoin the ranks as union members and to work for signatory contractors, a type of activity expressly sanctioned by the Act, permit-

⁶ The charge claiming Respondents violated the Act in making these or other statements to Anglin was withdrawn and the testimony concerning this conversation was proffered only as part of the General Counsel's efforts to establish Respondents' actions toward Joel and Eliseo Calderon were part of a plan or scheme to unlawfully influence them to quit their employment with Condiotti and rejoin the Union.

⁷ Allen further testified:

I heard Dan Digardi stating to Gary that if he continued to remain employed by our firm that he would lose all of his union benefits.

Upon hearing that, I stated to Gary, "I don't think that's true Gary. I believe that your benefits that are vested do belong to you," and at that point in time—and that they were protected by federal law.

And at that time, Dan Digardi responded to me that perhaps he didn't know fully what he was saying and that he was not an attorney or a labor expert. That was his understanding, and perhaps I did misspeak.

⁸ Anglin did not believe Repondent could hold up his pension. He looked at the pension plan booklet but could not understand it.

ting “peaceful persuasion.” *NLRB v. Teamsters Local 639*, 362 U.S. 274, 286 (1980). “[Section] 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof” *Id.* at 290.

The Court in *NLRB v. Laborers Local 534*, *supra*, specifically relied on the lack of a finding the Union or its members would take some action and there was no finding the union agents’ statements were false. Eliseo Calderon clearly recalled Digardi and Schager mentioning they would lose both their pension and annuity benefits. Digard did not say their benefits may be delayed, they were told they would be lost. Digardi and Schager did not give the Calderon’s detailed information about the impact of their conduct on their benefits, rather they repeated strong and inaccurate threats of loss of all benefits. These statements are not truthful predictions or statements of fact, which Digardi, in effect conceded when he admitted he might be wrong.

While Eliseo Calderon’s pension was not vested, Joel Calderon’s pension had vested and they both had annuities which they would not lose. I find Eliseo Calderon, whose testimony was unrefuted to be a credible witness based on his forthright demeanor and clear recollection of the events. This conclusion is buttressed by the testimony of Allen, Lee, and Anglin that Digardi and Schager were heard to inform the Calderons they would lose all benefits, which included those that were vested, such a Joel Calderon’s pension and Joel and Eliseo Calderon annuities.

Thus, I find Respondents’ agents did make false statements to Joel and Eliseo Calderon concerning the loss of Joel Calderon’s pension benefits and Joel and Eliseo Calderons’ annuities. I conclude Digardi and Schager overstated the risks of working for a contractor that is not a signatory to a collective-bargaining agreement with Respondents, and implied Respondents would take these negative actions unless Joel and Eliseo Calderon stopped working for Condiotti. Joel and Eliseo Calderon both testified they believed Digardi was telling them the truth. The unrefuted evidence is Digardi admitted he may have misstated facts and overstated the impact of Joel and Eliseo Calderons’ continued employment with Condiotti.

Digardi also informed Joel and Eliseo Calderon: “that we could file for unemployment benefits only if we go and work for them, picketing, and then they would lay us off. And that was the only way we could bet unemployment benefits, because we—with Condiotti we couldn’t get unemployment benefits.”

That the actual loss or diminution of benefits results from actions taken by third parties is not an exculpatory factor under these circumstances. As found in *Bay Cities Metal Trades Council*, 306 NLRB 983, 985–986 (1992):

I have considered that the threatened loss of employment benefits involved conduct which Respondent attributed to a third party, the Employer. Nonetheless, I am persuaded the threat is “coercive” within the meaning of Section 8(b)(1)(A), inasmuch as it is a threat of the loss of existing employment benefits which was expressed to the employees by the labor organization which is the exclusive collective-bargaining agent of the employees to who it was addressed. Under these circumstances, the threat was reasonable calculated to “coerce” the employees within the meaning of Section 8(b)(1)(A), and would have this calculated effect without regard to whether the em-

ployees were told by employees that the Employer rather than Respondent, might implement the threat.

Analogously, Digardi and Schager incorrectly informed Joel and Eliseo Calderon they would lose all benefits, including vested pension benefits and annuities. These remarks were made by Respondent’s representatives indicating what action Respondent would take if Joel and Eliseo Calderon continued in the exercise of their Section 7 rights to resign from Respondent and continue their employment with Condiotti.

Respondents failed to introduce any objective facts that Joel and Eliseo Calderon would lose their annuities and Joel Calderon would lose his pension. Respondents also failed to adduce any objective evidence concerning Digardi’s and Schager’s reasons for talking to the Calderons. Nor was there any evidence Digardi and Schager were merely making truthful predictions or had some other reasonable basis for these threats. A delay in receiving benefits is not analogous to the loss of such benefits and Digardi. When confronted, admitted the may not have been accurate in there statements. There is no indication Respondents’ attempted to correct these misstatements.

The threats came from Respondents and included improperly claimed losses of pension and annuities. Digardi and Schager did not explain to Joel and Eliseo Calderon the Trust Funds, not the Respondents, were required under existing agreements to terminate most of their benefits. Rather, they threatened the loss of all benefits because they resigned their union memberships and continued to work for Condiotti. The record requires the conclusion Respondents’ threats reasonably tended to coerce and intimidate the Calderons in the exercise of their Section 7 rights. *Service Employees Local 144 (Sands Point Nursing Home)*, 321 NLRB 399 (1996). By this threat of loss of all benefits, Respondents have violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

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

2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents violated Section 8(b)(1)(A) of the Act by threatening employees with the loss of all existing benefits, including vested pension benefits and annuities, because the employees exercised their Section 7 right to resign from Respondents.

4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondents engaged in certain unfair labor practices, in violation of Section 8(b)(1)(A) of the Act, I recommend that they be ordered to cease and desist therefrom 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 recommended⁹

⁹ 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.

ORDER

The Respondents, Carpenters Union Local 180, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Carpenters Union Local 751, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Northern California Carpenters Regional Council, shall

1. Cease and desist from

(a) Threatening to terminate vested by otherwise due and owing benefits, because individuals resigned from Respondents and worked for an employer that was not a signatory to a collective-bargaining agreement.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Regional Director post at its offices, hiring facilities, and meeting places, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily

¹⁰ If this Order is enforced by a Judgment of the 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."

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

(b) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official or officials, on a form provided by the Region attesting to the steps that Respondents have 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 threaten to terminate vested or otherwise due and owing entitlements and/or benefits, because individuals resigned from our unions and worked for an employers that was not a signatory to a collective-bargaining agreement.

WE WILL NOT in any like or related manner, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CARPENTERS UNION LOCAL 180, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO; CARPENTERS UNION LOCAL
751, UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO, NORTHERN
CALIFORNIA CARPENTERS REGIONAL COUNCIL