

United Union of Roofers, Waterproofers, and Allied Workers, Local 11, AFL-CIO (Funderburk Roofing, Inc.) and Funderburk Roofing, Inc. Case 13-CP-697

May 19, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

On May 20, 1997, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in response to the Respondent's exceptions.

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 judges rulings,¹ findings,² and conclusions,³ 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, the United Union of Roofers, Waterproofers, and Allied Workers, Local 11, AFL-CIO, Westchester, Illinois, its officers, agents, and representatives shall take the action set forth in the Order.

Richard Kelliher-Paz, Esq., for the General Counsel.

Barry M. Bennett, Esq. (Asher, Gittler, Greenfield, Cohen & D'Alba, Ltd.), of Chicago, Illinois, for the Respondent.

Jim R. Sturgeon, Esq. (Sturgeon & Associates), of St. Charles, Illinois, for Funderburk Roofing, Inc.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to a charge timely filed, a complaint was issued on

¹ The Respondent excepted to the judges inadvertent failure to incorporate all of the unopposed transcript corrections in the General Counsel's Motion to Correct the Transcript. We therefore approve and append the General Counsel's Motion to Correct the Transcript to our decision here as Appendix A [omitted from publication].

² The Respondent excepts to the judges admission of evidence of the Respondent's dealings with Funderburk Roofing, Inc. prior to the picketing at issue in this case. Respondent says that this ruling is contrary to law. We find no merit to the exception. The judge correctly noted that such evidence is germane as background to the events here, and he did not rely on it when he found that the Respondent violated Sec. 8(b)(7) of the Act.

³ Contrary to the Respondent's contention, we do not find that the judge applied a per se rule that the language on the picket signs necessarily demonstrated a recognitional object. Rather, consistent with the Board's decision in *Alton-Wood River Building (Jerseyville Retail Merchants)*, 144 NLRB 526 (1963), the judge based his conclusion that recognition was an objective of the Respondents threats to picket and its picketing of Funderburk Roofing, Inc. (FRI) at the Center jobsite, on an objective factual analysis of all of the relevant evidence presented.

August 16, 1996, which alleged that the United Union of Roofers, Waterproofers, and Allied Workers, Local 11, AFL-CIO (Respondent) had violated Section 8(b)(7)(A) of the National Labor Relations Act (the Act), by unlawfully picketing the jobsite of Funderburk Roofing, Inc. (FRI). Respondent's answer denied the commission of any unfair labor practice.

A hearing was held before me in Chicago, Illinois, on November 13, 1996, and February 4, 1997.¹ Simultaneous post-hearing briefs were thereafter submitted by the General Counsel and Respondent on March 19, 1997.

FINDINGS OF FACT²

I. JURISDICTION

FRI is an Illinois corporation with its principal place of business in Winfield, Illinois, where it is engaged as a roofing contractor. During the 12 months preceding issuance of the complaint, Respondent, in the course of its business, (1) derived gross revenues in excess of \$500,000 and (2) purchased and received goods and materials valued in excess of \$50,000 from points outside Illinois or from other employers which had received those goods and materials directly from outside the State. It is admitted,³ and I find, that FRI is an employer engaged in commerce within the meaning of the Act.

Respondent is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The relationship between FRI and Local 707

On October 1, 1993, Anthony Monaco, a business agent for the Production Workers Union of Chicago and Vicinity, Local 707, organized a majority of FRI's employees.⁴ He thereafter showed the cards to FRI's president, Michael Funderburk,⁵ and the two men signed a collective-bargaining agreement⁶ which was dated October 1, 1993, and was effective by its terms from that date through September 30, 1996.⁷

¹ The unopposed transcript corrections submitted by the General Counsel and set forth in Appendix A (omitted from publication) to this Decision is hereby adopted.

² Unless otherwise indicated, the findings here are based on uncontroverted evidence.

³ At the hearing, Respondent amended its answer to admit the jurisdictional allegations of the complaint.

⁴ Monaco's uncontroverted testimony to this effect is supported by authorization cards signed by four of FRI's employees.

⁵ Monaco so testified without controversion.

⁶ The parties stipulated that the following employees constitute a unit appropriate for the purpose of collective bargaining:

All employees who perform the application and installation of any and all types of roofing related shingles and carpentry work; all cementing; laying of felt or paper, and all forms and kinds of plastic, slate slag, gravel asphalt, prepared paper, and composition roofing; and any and all compressed paper, chemically prepared paper, and burlap when used for roofing or damp and waterproof purposes; all damp courses, sheeting, or coating on all foundation work; all tarred floors; all laying of tile or brick when laid in pitch, tar, asphalt mastic, marmoline, neoprene/hypolon systems, or any form of bitumen and all other work in connection with or incidental thereto, but excluding guards and supervisors as defined in the Act.

⁷ The agreement is of record, and Monaco and Funderburk both credibly acknowledged that their signatures appeared thereon.

By letter dated October 4, 1993, Funderburk wrote Monaco stating: "I am aware that our employees have recognized National Production Workers Union #707, as their exclusive bargaining agent."⁸ The first numbered paragraph of a "Side Letter of Agreement" executed by Monaco and Funderburk on October 13, 1993, sets forth the following language:

The EMPLOYER has previously recognized the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the occupational jurisdiction of the UNION. Prior to recognition and prior to signing the CBA, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of the EMPLOYER.

Based on the foregoing findings, I conclude that Local 707 was the Section 9(a) representative of FRI's employees. See *Goodless Electric Co.*, 321 NLRB 64, 66 (1996). I therefore conclude that Respondent could not lawfully raise a question of representation pursuant to Section 9(c) of the Act during the effective period of the collective-bargaining agreement between Local 707 and FRI. See *Electrical Workers IBEW Local 363*, 201 NLRB 875, 879 (1973).

2. The early relationship between FRI and Respondent⁹

In October 1982, when FRI's employees were not represented by a union and FRI was performing a job for Block Electric, Respondent's business agent, Richard Mathis, asked Funderburk to sign a contract with Respondent and stated that Respondent would picket the Block Electric job unless Funderburk did so. Funderburk stated that he would consider signing, but instead hired another contractor who was a signatory to Respondent's contract to finish the job in order to avoid the threatened picketing.¹⁰ In June 1993, a time at which FRI's employees were still not represented by a union, Respondent mailed Funderburk a letter containing the union's wage and benefit rates.

On November 21, 1994, Respondent's attorney, Barry M. Bennett, sent FRI's attorney a letter which acknowledged that FRI's employees were represented by Local 707 and stated that Respondent was going to engage in informational picketing "to inform the public that Funderburk does not have a contract with Local 11 or any AFL-CIO affiliate." On November 22, 1994, Respondent began picketing FRI at a jobsite on the campus of the University of Illinois at Chicago with signs that bore the following language:¹¹

NOTICE
TO THE PUBLIC ONLY
EMPLOYEES OF
FUNDERBURK RFG

are not represented by or protected by a contract with Roofers Local 11 or any other AFL-CIO affiliate.

No dispute with any other employer.

We are not asking any employee to refuse to perform services or make pickups or deliveries

Informational Pickets ONLY
(NOT FOR CONTRACT)
Local No. 11

On November 30, 1994, FRI filed an unfair labor practice charge alleging that Respondent was unlawfully picketing for recognition purposes at a time when FRI's employees were represented by a labor organization. Region 13 thereafter issued a complaint and filed a petition with the United States district court for injunctive relief pursuant to Section 10(l) of the Act. After hearing, the court issued the requested injunction on December 28, 1994. On January 27 of the following year, Region 13 approved a settlement agreement containing a nonadmissions clause, which disposed of the matter.

B. Respondent's Picketing of FRI's Jobsite in 1996¹²

Wight & Company (Wight) is the construction manager for the Kane County Juvenile Justice Center (Center) in St. Charles, Illinois. On January 23, FRI signed a contract with to do the roofing work on the Center. On July 30, Respondent sent Wight the facsimile of a letter which stated:

We understand that your firm is serving as construction manager and has hired Funderburk Roofing to perform work on the job at the Kane County Juvenile Justice Detention Center. Local 11 is troubled by the fact that a firm which does not have a collective bargaining agreement with an AFL-CIO affiliate is being used on this job and is receiving money raised through taxes. Local 11 is aware that Funderburk Roofing has a collective bargaining agreement with the Production Workers Union of Chicago & Vicinity, Local 707, and we have no interest in interfering with that relationship. We do not seek or desire recognition, bargaining, a contract, or the opportunity to represent Funderburk's employees. We do intend to take peaceful and lawful steps to notify the public that a firm which does not have a contract with an AFL-CIO union is doing work on this project. We have no desire to interfere with the work of any other trade and we have no dispute with any other employer.

The same day, Respondent mailed a separate letter to FRI, with copies to Wight and the Kane County Commissioners, which stated:

Local 11 understands that your firm is performing work at the Kane County Juvenile Justice Detention Center. We are aware that your firm has a collective bargaining agreement with the Production Workers of Chicago & Vicinity, Local 707. We have no interest in disrupting that contractual relationship, and we recognize we could not do so in any event. Accordingly, we have no interest in signing a contract with your firm, we have no interest in representing your firm's employees,

⁸ The letter is of record.

⁹ Evidence underlying the findings in this sec. was admitted solely to provide background which might shed light on Respondent's motivation. See *Pronto Plastics Co.*, 275 NLRB 1379, 1380 (1985).

¹⁰ I credit Funderburk's uncontroverted testimony as to the steps he took after meeting with Respondent's representative.

¹¹ A copy of the notice which accurately reflects both relative print size and boldness appears in Appendix B to this Decision.

¹² All dates hereinafter are 1996, unless otherwise indicated.

and we have no interest in having your firm employ our members.

Local 11 does, however, have a significant interest in notifying the public that your firm does not have a contract with us or any AFL-CIO union and informing the public that tax dollars are going to a firm which does not have a contract with an AFL-CIO affiliate. We intend to take lawful and peaceful steps to publicize these facts. We will do so in a manner which is consistent with the statements in this letter and in a manner which does not affect any other contractors or employees. If you have any questions, please feel free to contact me.

On July 31, August 1, and August 2, Respondent picketed FRI at the Center jobsite with signs which read:¹³

NOTICE TO THE
PUBLIC ONLY

Funderburk Roofing does not have a contract with or employ members of Roofers Local 11 or any AFL-CIO affiliate.

Work on this COUNTY FACILITY should be done by contractors that employ members of and have agreements with AFL-CIO Unions.

We do NOT want a contract or recognition from Funderburk.

INFORMATIONAL PICKET ONLY.

We are NOT asking any employee to refuse to perform services or make pickups or deliveries.

ROOFERS LOCAL 11

The record establishes that Respondent might have picketed the jobsite even if FRI's employees had been represented by an affiliate of the AFL-CIO,¹⁴ but no picketing would have taken place if (1) FRI had a collective-bargaining agreement with Respondent¹⁵ or (2) FRI had been replaced at the Center jobsite by a roofer which was signatory to a contract with Respondent.¹⁶

On August 1, FRI filed an unfair labor practice charge alleging that Respondent had violated Section (b)(7)(A) and (C) of the Act. After investigation, Region 13 issued the instant complaint and filed a petition with the United States District Court for injunctive relief pursuant to Section 10(l) of the Act.

Also on August 1, Keith N. Johnson, Wight's representative at the Center jobsite, called Bennett to convey FRI's suggestion that FRI put some of Respondent's members on the job in order to resolve the dispute. Bennett rejected the offer, explaining that FRI had a contract with another union which would not permit that approach and Respondent was not interested in such an approach in any event. When Johnson stated a desire to resolve the problem, Bennett replied that there was nothing FRI could do because it was under contract with another union and that relationship could not be

changed or interfered with. Bennett explained that Respondent's purpose was to alert the public that FRI did not have a contract with an AFL-CIO affiliate in the hope that public pressure would persuade the county to remove FRI from the job. Johnson stated that the matter was not within Wight's control and iterated his desire to resolve the problem. During this conversation, Johnson noted that other trades were refusing to cross Respondent's picket line. Bennett suggested a separate gate system, which Johnson said would be ineffective.

In a telephone call that afternoon, Johnson informed Bennett that FRI had initiated legal proceedings and asked whether Respondent would continue picketing if FRI was removed from the job pending the outcome of those proceedings. When Bennett indicated his belief that it would be unlawful for Respondent to continue picketing if FRI was not on the job, Johnson stated that he would ask FRI to "stand down" at the close of business on August 2 and would provide Respondent with advance notice of FRI's return to the site. Bennett stated that, under those circumstances, he would advise his client to stop picketing after August 2. Johnson sent Respondent an August 1 letter memorializing the agreement with Bennett.

FRI left the Center jobsite at the end of the day on August 2 and did not return until August 27, the day after the United States District Court issued a temporary restraining order in the Region's suit. That order prohibited Respondent from picketing or threatening to picket FRI at the Center jobsite. On August 24, the day after the temporary restraining order expired, the district court denied the Region's motion for a preliminary injunction, but continued the matter for 30 days and permitted the Region to file an appropriate motion if Respondent recommenced picketing.¹⁷ FRI continued to work at the Center jobsite until October 15. Respondent did not picket the Center jobsite after August 2.

C. Discussion

It is a violation of Section 8(b)(7)(A) of the Act for a union to threaten to picket or to picket an employer for the purpose of forcing that employer to recognize or bargain with the union during any period when the employer has lawfully recognized another labor organization and a question concerning representation may not be raised under Section 9(c) of the Act. *Electrical Workers IBEW Local 363*, supra. Given my earlier conclusion that no question concerning Local 707's representational status could be raised under Section 9(c) during the life of its contract with FRI, the only remaining question before me is Respondent's objective in picketing FRI.

In order to establish the alleged violation, the General Counsel must demonstrate that recognition or organization was an objective of Respondent's threat to picket or its picketing of FRI. *Commercial Workers, Local 1063*, 249 NLRB 372, 378 (1980). Picketing with signs reading "does not

¹³ A copy of the notice which accurately reflects both relative print size and boldness appears in Appendix C to this Decision.

¹⁴ Joseph Sullivan, Respondent's president, appeared to change his testimony on this point several times while responding to the General Counsel's questions, but gave the credited testimony relied on in the text after being confronted with his prior testimony before the United States district court.

¹⁵ Sullivan candidly so testified.

¹⁶ Sullivan candidly so testified.

¹⁷ Sullivan responded to a leading question that he "thought" the contract between FRI and Local 707 expired on September 30. The tentative nature of this answer falls short of establishing that Respondent was aware of that expiration date when it stopped picketing. Accordingly, it is possible that Respondent was deterred from picketing after August 24 by the fact that the court had permitted the General Counsel to refile a preliminary injunction motion if picketing recommenced.

employ members of” imports an organizational objective, while the language “does not have a contract with” implies both recognitional and bargaining objectives. E.g., *Hotel & Restaurant Employees*, 135 NLRB 1183, 1185 (1962). Self-serving disclaimers of an unlawful objective are insufficient to prevent the finding of a violation.¹⁸ *San Diego Typographical Union No. 221*, 264 NLRB 874, 876 (1982). In this case, it was established that Respondent (1) might have picketed FRI at the Center jobsite even if an AFL–CIO affiliate represented FRI’s employees and (2) would not have picketed the site if FRI recognized or had a contract with Respondent. Such evidence supports the finding of a proscribed objective. E.g., *Commercial Workers Local 1063*, supra. Based on the foregoing findings, I conclude that the record establishes that recognition was, at the least, an objective of Respondent’s threats to picket and its picketing of FRI at the Center jobsite. Accordingly, I conclude that Respondent’s conduct violated Section 8(b)(7)(A) of the Act.

CONCLUSIONS OF LAW

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

2. Respondent and Local 707 of the Production Workers Union of Chicago and Vicinity are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening to picket FRI on August 1, 1996, and by picketing FRI at the Center jobsite on July 31–August 2, 1996, with an organizational and/or recognitional objective, at a time FRI had lawfully recognized Local 707 of the Production Workers Union of Chicago and Vicinity and a question concerning representation could not be raised under Section 9(c) of the Act, Respondent engaged in unfair labor practices in violation of Section 8(b)(7)(A) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(b)(7)(A) of the Act, 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 recommended¹⁹

ORDER

The Respondent, the United Union of Roofers, Waterproofers, and Allied Workers, Local 11, AFL–CIO, Westchester, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to picket or picketing Funderburk Roofing, Inc., with an organizational or recognitional objective, at

¹⁸ Respondent contends that its failure to picket FRI’s private jobs can only be interpreted to mean that it intended to pressure public authorities to fire FRI. To the contrary Respondent’s picketing of public jobs with a recognitional objective would be a logical course of action if FRI’s public jobs were bigger and more lucrative than its private jobs, a matter as to which the record is silent.

¹⁹ If no exceptions are filed as provided by Sec 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order herein 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.

a time when that employer has lawfully recognized another labor organization and a question concerning representation cannot be raised under Section 9(c) of the Act.

(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.

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 Westchester, Illinois, copies of the attached notice marked “Appendix D.”²⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately on receipt 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, furnish the Regional Director with signed copies of the aforesaid notice for posting by Funderburk Roofing, Inc. and Local 707 of the Production Workers Union of Chicago and Vicinity, if willing, at places where they customarily post notices to their respective employees and members.

(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.

APPENDIX B

NOTICE

TO THE PUBLIC ONLY

EMPLOYEES OF

FUNDERBURK RFG

are not represented by or protected by a contract with Roofers Local 11

or any other AFL–CIO affiliate.

No dispute with any other employer.

We are not asking any employee to refuse to perform services or make

pickups or deliveries

Informational Pickets ONLY

(NOT FOR CONTRACT)

Local No. 11

²⁰ 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.”

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX C

**NOTICE TO THE
PUBLIC ONLY**

Funderburk Roofing does not have a contract with or employ members of

Roofers Local 11 or any AFL-CIO affiliate.

Work on this COUNTY FACILITY should

be done by contractors that employ members of and have agreements with AFL-CIO Unions.

We do NOT want a contract or recognition from Funderburk.

INFORMATIONAL PICKET ONLY.

We are NOT asking any employee to refuse to perform services or make pickups or deliveries

ROOFERS LOCAL 11

APPENDIX D

NOTICE TO EMPLOYEES

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 picket or picket Funderburk Roofing, Inc., with an organizational or recognitional object at a time when that employer has lawfully recognized another labor organization and a question concerning representation cannot be raised under Section 9(c) of the Act.

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

UNITED UNION OF ROOFERS,
WATERPROOFERS AND ALLIED WORKERS,
LOCAL 11