

**Local 282, International Brotherhood of Teamsters, AFL-CIO (TDX Construction Corp.) and Queens West Development Corp.** Cases 29-CP-597 and 29-CB-10074

October 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On May 29, 1998, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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 only to the extent consistent with this decision and to adopt the recommended Order as modified.<sup>1</sup>

Contrary to the judge, we find that the Respondent did not violate Section 8(b)(6) by attempting to cause TDX to employ an onsite steward. The Respondent's demand for an onsite steward was a good-faith offer to perform relevant work. As such, it does not fall within the limited kind of featherbedding proscribed by Section 8(b)(6).

The facts

The events at issue here took place on the Queens West construction project in Long Island City, New York. Queens West Development Corporation (QWDC), a state agency and subsidiary of the Empire State Development Corp. (ESDC) has direct responsibility for the construction effort. Pursuant to a contract with QWDC, TDX supervises the project, ensuring that work is done in accordance with the contracts. TDX employs four employees at the jobsite: a project manager, two project superintendents, and one secretary. The project manager and superintendents are civil engineers who coordinate and supervise the work of the contractors performing the work on the project. TDX does not receive deliveries of materials, direct trucks delivering materials, or unload trucks.

On various dates in September and October 1996,<sup>2</sup> the Respondent asked TDX to employ an onsite steward (OSS). TDX refused. The Respondent began to picket the jobsite on December 6. The picket line was with-

drawn when one of the contractors on the project employed an OSS.

According to the Respondent, the working duties of an OSS include hauling and moving materials on the site, coordinating deliveries of materials on the site, coordinating safety efforts relating to teamsters on the site, and working at the direction of the employer. The OSS hired by another contractor on the Queens West project did in fact perform these duties.

The contract between TDX and QWDC does not prohibit employment of an OSS. However, in order to hire an OSS, TDX would have to obtain approval from QWDC in order to be compensated for that person's work.

The judge's decision

The judge observed that a union must make a "bona fide offer of competent performance of relevant services" in order to avoid the proscription of Section 8(b)(6). *Teamsters Local 456 (J. R. Stevenson Corp.)*, 212 NLRB 968, 970 (1974), quoting *NLRB v. Gamble Enterprises*, 345 U.S. 117, 123-124 (1953). He noted that TDX had the function of overseeing the project and ensuring that the site contractors performed their work according to the job specifications. He found that none of the functions of an OSS, which included hauling materials and helping coordinate deliveries, were performed by TDX or were relevant to the responsibilities of that company. Relying on the Board's decisions in *Metallic Lathers Local 46 (Expanded Metal Engineering Co.)*, 207 NLRB 631 (1973), and *Stevenson*, supra, discussed below, the judge concluded that the Respondent violated Section 8(b)(6) because its demand for an OSS was not a bona fide offer of competent performance of relevant services.

Analysis

The judge construed the statute and case law too broadly. The Supreme Court has made it eminently clear that the proscriptions of Section 8(b)(6) are very narrow. In *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100, 106 (1953), the Court, after reviewing the legislative history of the section, concluded:

However desirable the elimination of all industrial featherbedding practices may have appeared to Congress, the legislative history of the Taft-Hartley Act demonstrates that when the legislation was put in final form Congress decided to limit the practice but little by law. *American Newspaper Publishers*, supra at 106.

In the companion cases of *American Newspaper Publishers*, supra, and *NLRB v. Gamble Enterprises*, supra, the Court set forth the standard for determining whether a union's conduct violates Section 8(b)(6). In *American*

<sup>1</sup> We grant the General Counsel's unopposed motion to include in its Exh. 6 the second page of the Heavy Construction and Excavating Contract referred to in the judge's decision.

<sup>2</sup> All dates are in 1996 unless otherwise indicated.

*Newspaper Publishers*, a typographical union was charged with violating the Act by insisting that newspaper publishers pay printers for reproducing advertising matter for which the publishers had no use because it had already been provided by the advertiser. The practice at issue was known as “setting bogus.” The Court concluded that the statute had a very limited reach. It stated:

The Act now limits its condemnation to instances where a labor organization or its agents exact pay from an employer in return for services not performed or not to be performed. Thus, where work is done by an employee, with the employer’s consent, a labor organization’s demand that the employee be compensated for time spent in doing the disputed work does not become an unfair labor practice. The transaction simply does not fall within the kind of featherbedding defined in the statute. [345 U.S. at 110.]

The Court agreed with the lower court and the Board that the insistence by the union on payment of wages for “setting bogus” called for payment only for work actually done. In finding no violation, the Court concluded: “Section 8(b)(6) leaves to collective bargaining the determination of what, if any, work, including bona fide ‘made work,’ shall be included as compensable services.” *Id.* at 111.

The Court struck a similar theme in *Gamble*. There, a musicians’ union was charged with unlawfully insisting that the management of one of an interstate chain of theaters employ a local orchestra to play in connection with traveling band and vaudeville appearances. The management did not need or want to employ the orchestra. Noting that the union was not demanding “stand by” pay, but was requesting actual employment, the Court treated the union’s local orchestra proposal as made in good faith, contemplating the performance of actual services. The Court found no violation, concluding:

Payments for “standing-by,” or for the substantial equivalent of “standing-by,” are not payments for services performed, but when an employer receives a bona fide offer of competent performance of relevant services, it remains for the employer, through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done. [345 U.S. at 123–124.]

Although the standard set forth in *Gamble* includes a bona fide offer of “relevant” services, the Court did not discuss the meaning of “relevant.” The term is not in the text of Section 8(b)(6) and the Court did not use it in *American Newspaper Publishers*, the companion case to *Gamble*. The Court’s focus was not on relevant service;

it was on actual service. The task of working out the implications of *Gamble*’s relevance standard was left to be undertaken in later cases.

In *New York District Council of Carpenters (Graphic Displays, Ltd.)*, 226 NLRB 452 (1976), the Board issued its leading decision giving content to the relevance gloss that *Gamble* read into Section 8(b)(6). In that case, Zelenko Associates built an exhibit using panels built by Exhibit Corporation/Contemporary Displays, Inc. (ECC) and Graphic Displays, Ltd. (Graphic). ECC had a contract with the respondent; Graphics had a contract with a different union. The exhibit was to be installed by a contractor whose employees were represented by the respondent. When the respondent discovered that employees represented by a different union had built some of the panels, the respondent told Zelenko that the exhibit would not be installed until it had been “handled” by a shop having a collective-bargaining agreement with the respondent. Zelenko sent the exhibit to ECC where the elements were checked, the panels were cleaned, and minor repairs were made. The exhibit was then returned and erected.

The Board found that the respondent’s demand that the exhibit be handled by ECC did not violate Section 8(b)(6). Noting that it was important that the panels of the exhibit be clean and in good repair, the Board found that the services performed by ECC furthered this objective and were therefore “relevant.” In so finding, the Board acknowledged that the services might not have been needed or desired:

It may well be that ECC’s services were unnecessary and/or were not desired by Zelenko, but necessity and/or need are not and never have been the determinants of whether the services are “relevant” under Section 8(b)(6). . . . It is sufficient that the work performed has to do with the product or service offered, regardless of whether the work is necessary or desirable. [226 NLRB at 453.]

The Board further found that the presence of a collective-bargaining agreement was not relevant to a determination of whether Section 8(b)(6) had been violated. Instead, the only purpose of the section was to prevent payment for no work, regardless of whether the demand for payment was made in the context of a collective-bargaining agreement. The Board stated:

Nothing in that section implies that its applicability is dependent on the existence or nonexistence of a collective-bargaining relationship. It is designed to accomplish one objective, and one objective only—the prevention of the payment of money for work not per-

formed or not to be performed. This objective applies both within and without a collective-bargaining relationship. Zelenko could have refused to let the exhibit be “handled” by ECC, but it didn’t. It acquiesced in the work and was billed for it. This does not constitute a violation of Section 8(b)(6). *Id.*

The Board’s analysis of *Gamble*’s relevance standard in *Graphic Displays* rests on the requirement that work having to do with the employer’s business be performed or contemplated. In this regard, the Board expressly rejected the argument, advanced in the dissenting opinion, that there can be no bona fide offer of “relevant” services if the employer does not have a need for the services proffered.

The dissenters relied on two earlier decisions where the Board found violations of Section 8(b)(6), *Metallic Lathers Local 46 (Expanded Metal Engineering Co.)*, 207 NLRB 631 (1973), and *Teamsters Local 456 (J. R. Stevenson Corp.)*, 212 NLRB 968 (1974). In *Metallic Lathers*, the respondent’s members were engaged in the highly specialized trade of lathing. The employer manufactured steel channels, and when on rare occasions the cutting of channels was required, it was done by warehouse employees represented by another union. The respondent, knowing that the employer could not assign the cutting work to its members, insisted that the employer hire one of its members to do office work. The employer did so and discovered within 1 week that the employee was not qualified to do office work. The employee was then assigned the tasks of addressing envelopes and repainting furring channels, which he refused to perform. In the end, he did some delivery work that only took about 50 percent of his time. He was idle for the remainder of his 8-hour day. Similarly, in *Stevenson*, the respondent demanded the presence of one of its members on the employer’s jobsite, even though there was no work for the member to perform. As a result, the respondent’s member did no work of any sort for the employer. His only activity on the site was to check union cards in his capacity as a union steward. The Board found violations of 8(b)(6) in both *Metallic Lathers* and *Stevenson*, in part on the ground that “the purported services were not relevant to any company need,”<sup>3</sup> or that the employer did not have “even a prospective need for”<sup>4</sup> the services proffered.

The dissenters in *Graphic Displays* relied on this language and argued that *Metallic Lathers* and *Stevenson* required a finding that the respondent violated Section 8(b)(6) in *Graphic Displays* because the employer there

did not have “even a prospective need” for the specialized services offered by the respondent. *Graphic Displays*, supra, 226 NLRB at 455.

The *Graphic Displays* majority rejected this view of *Metallic Lathers* and *Stevenson* and in effect rationalized the earlier decisions. It asserted that they were “distinguishable in that no work was performed in connection with the disputed function.” *Id.* at 453 fn. 6. By making this distinction in response to the dissenters’ express reliance on the “need” rationale in *Metallic Lathers* and *Stevenson*, the Board effectively rejected portion of its prior decisions and relied, instead, on the fact that no work was performed or contemplated.

In *Graphic Displays*, therefore, the Board put to rest the confusion engendered by the relevance analysis in its earlier decisions. It held that “necessity and/or need are not—and never have been—the determinants of whether services are ‘relevant’ under Section 8(b)(6).” (Emphasis added.) *Id.* at 453. The Board made clear that the touchstone for any analysis of an 8(b)(6) allegation is whether any work is performed or contemplated, regardless of whether the employer needs or desires it. To be relevant, such work need only have “to do with the product or service offered.” *Id.*

The Board’s understanding of “relevant service” in *Graphic Displays* is fully consistent with the Court’s reasoning in *American Newspaper Publishers* and *Gamble*. Neither of the employers in those cases needed nor wanted the work demanded by the unions. In *American Newspaper Publishers*, the employer had no need or desire for reproducing advertising matter that had already been provided by the advertiser. Similarly, in *Gamble*, the theater owner did not need or desire an orchestra to play for certain programs. Yet in both cases, the union demands were for actual work having to do with the employer’s business. In *American Newspaper Publishers*, the demand was for setting print, albeit “bogus setting”; in *Gamble*, the demand was for a different kind of entertainment in addition to that already offered by the employer. In both cases, the Court found that there was a bona fide offer of competent performance of relevant services.

Application of the Supreme Court’s reasoning in *American Newspaper Publishers* and *Gamble*, as well as the Board’s analysis in *Graphic Display*, compels dismissal of the 8(b)(6) allegation in the case at bar. The Respondent’s demand for an OSS was an offer for actual work to be performed. Typically the OSS hauls materials, coordinates deliveries, and does other construction site work at the employer’s direction. Indeed, when one of the other contractors on the Queens West project hired the Respondent’s OSS, he performed those duties for the

<sup>3</sup> *Metallic Lathers*, supra, 207 NLRB at 636.

<sup>4</sup> *Stevenson*, supra, 212 NLRB at 970.

contractor. The Respondent here did not ask TDX to hire an OSS who would do nothing for TDX.

To be sure, TDX did not want or need the services of an OSS. It was supervising construction work rather than performing such work at the Queens West project. Nevertheless, its contract with QWDC did not prohibit the hiring of an employee who would perform the duties of an OSS. Nor did the contracts between QWDC and the contractors supervised by TDX limit TDX's ability to perform work on the jobsite. The Respondent's demand for an OSS did not run afoul of TDX's contractual obligations and did not seek the hire of an employee with skills not relevant to TDX's business. That TDX was supervising rather than performing construction work does not require a different result. The services offered were within TDX's sphere of activity, just as in *Gamble* the union's offer of orchestral performances was within the theater owner's sphere of activity even though the owner's business had changed and it had ceased providing or paying for musical accompaniment months before the union's offer.

Our dissenting colleague does not question our finding that the Respondent's demand for an OSS was an offer for actual work to be performed. His quarrel lies, instead, with our finding that the offered services were relevant to the Respondent's business. He argues that while such services were probably relevant to a company that was performing construction work, they were not relevant to a company, like TDX, that was supervising construction work.

Our colleague construes the term "relevant" too narrowly by confining it to the work performed by a company at the time an offer of services is made. True, when the Respondent in the case at bar demanded an OSS, TDX was coordinating and supervising others, not performing, construction work itself. However, as shown above, the Respondent's offer of work included coordinating the delivery of materials on the site, coordinating safety efforts relating to teamsters on the site, and performing other work at the direction of TDX. Moreover, neither TDX's contract with QWDC, nor those of the contractors it supervised, prevented TDX from performing construction work at the site or prohibited it from hiring an OSS. TDX is a company in the construction industry acting as a construction manager on the Queens West project under a contract that does not bar it from performing the work offered by the Respondent. In these circumstances, the work of an OSS is within TDX's potential sphere of activity. It clearly "has to do with" the services rendered by TDX. *Graphic Displays*, supra. 226 NLRB at 453.

In sum, the Respondent's demand for an OSS did not seek payment for an employee to stand idly by. Nor did it seek payment for work that was not relevant to TDX's coordinating and supervising work at the Queens West project. Instead, the Respondent demanded the hiring of an OSS who would perform coordinating functions and construction work at TDX's direction. This transaction, as the Supreme Court teaches, "simply does not fall within the kind of featherbedding defined in the statute." *American Newspaper Publishers Assn.*, 345 U.S. 100, 110 (1953). We therefore dismiss the 8(b)(6) allegation of the complaint.<sup>5</sup>

#### ORDER

The National Labor Relation Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 282, International Brotherhood of Teamsters, AFL-CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(b) and reletter the subsequent paragraph.

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting.

Unlike my colleagues, I agree with the judge's conclusion that the Respondent violated Section 8(b)(6) of the Act. In general, I do not quarrel with my colleagues' description of the relevant precedents. Rather, my disagreement with my colleagues centers on their application of the relevant precedents to the instant facts.

It is undisputed that TDX does not receive deliveries of materials, direct trucks, deliver materials, or unload trucks. Nor do my colleagues seem to dispute the judge's finding that none of the functions of an OSS (the position sought) was actually performed by TDX. Rather, as my colleagues acknowledge and as the judge found, TDX *supervised* Queens West construction work and did not perform such work itself.

In light of these facts, the services being offered by the Union were not relevant to a company that was *supervising* construction work, albeit those services were probably relevant to a company that was *performing* construction work. Concededly, if a company is performing construction work, a union may well be privileged to seek the hiring of an OSS, even if that company has no need or desire to hire the OSS (e.g., if the services are already being performed by other employees).

In reaching their conclusion, my colleagues state that the Respondent's demand for an OSS was an offer for

<sup>5</sup> There are no exceptions to the judge's finding that the Respondent violated Sec. 8(b)(7)(C) of the Act.

actual work to be performed, as opposed to a demand that TDX hire someone to do nothing at all. This may well be true, but the issue is whether the offered services were relevant to Respondent's business. As to that issue, my colleagues concede that TDX supervised, but did not perform, construction work. They find, however, that the services offered were within TDX's sphere of activity. They argue that, in *Gamble*, the union's offer of orchestral performances was within the theater owner's sphere of activity. Indeed, the employer in *Gamble* was in the business of providing musical accompaniment, and the Union offered services that were within that sphere. The owner had, in the past, employed a local orchestra of nine union musicians to play for stage acts at its theater and, at a later time, had paid members of the local orchestra when a traveling band appeared at the theater. By contrast, the employer here oversees, but does not perform, construction work. If the employer in *Gamble* had been in the business of *overseeing* the hiring of orchestras, and if the union there had insisted that this overseeing company hire musicians, I submit that the result in *Gamble* would have been different. The union would not have been offering services that were relevant to the employer's business.

My colleagues confuse the terms "need" and "relevant." The terms are markedly different. For example, if a company is engaged in the manufacture of widgets, the Union can insist upon, and picket for, the hiring of additional widget makers, even if the company has no need for same. However, if the Union insisted on, and picketed for, the hire of a brass band, I believe that the conduct would be unlawful. The services would not simply be "unnecessary"; they would be irrelevant to what the company does.

Finally, *Graphic Displays*, 226 NLRB 452 (1976), is clearly distinguishable. In that case, Graphic and ECC were in the business of building panels. ECC's employees were represented by respondent union; Graphic's employees were not. Respondent union wanted to make sure that all work went through ECC. Thus, it offered relevant, albeit unnecessary, services to ECC.

My colleagues also contend that I construe the term "relevant" too narrowly. I disagree. In my view, they construe the term too speculatively, by relying, inter alia, on the alleged possibility that TDX might, in the future, have performed construction work at the site. Nor do I ascribe much weight to the fact that TDX was not contractually prohibited from hiring an OSS. This argument proves too much, in that TDX was also presumably not contractually prohibited from hiring a wide variety of potential employees whose services would clearly have been irrelevant to its business (a brass band, for exam-

ple). In this regard, I also emphasize the judge's finding, noted supra, that *none* of the functions of an OSS was actually performed by TDX.

In sum, because I take a less capacious view of TDX's sphere of activity than my colleagues do, I find that the instant case does not involve a bona fide offer of *relevant* services. I therefore find that the Respondent violated Section 8(b)(6).

#### APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket, cause to be picketed or threaten to picket TDX Construction Corp., at the Queens West jobsite, where an object thereof is forcing or requiring TDX to hire and employ an onsite steward, and to recognize or bargain with us as the collective-bargaining representative of an onsite steward, notwithstanding that a question concerning representation under Section 9(c) of the Act could not appropriately be raised, and without a valid petition under Section 9(c) having been filed within a reasonable period of time from the threat to picket or the commencement of the picketing, and notwithstanding that at no material time have we been certified by the Board as the collective-bargaining representative of any bargaining unit of employees of TDX at the Queens West jobsite.

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.

LOCAL 282, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-  
CIO

*Elias Feuer, Esq.*, for the General Counsel.

*Earl Pfeffer, Esq. (Cohen, Weiss, & Simon)*, of New York, New York, for the Respondent.

*Raymond McGuire, Esq. (Kauff, McClain, & McGuire)*, of New York, New York, for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on December 19, 1996, in Case 29-CP-597 on behalf of Queens West Development Corp. (QW), and based on a charge filed on December 23, 1996, in Case 29-CB-10074 on behalf of QW, a complaint was issued against Local 282, Inter-

national Brotherhood of Teamsters, AFL-CIO on February 28, 1997.<sup>1</sup>

The complaint alleges essentially that Respondent threatened to picket and picketed the QW jobsite in order to force and require TDX Construction Corp. (TDX) to (a) hire and employ an onsite steward (OSS) and (b) recognize and bargain with Respondent as the representative of an OSS at the QW jobsite. It is alleged that Respondent unlawfully engaged in this conduct in violation of Section 8(b)(7)(C) of the Act. It is also alleged that Respondent's actions constituted a violation of Section 8(b)(6) of the Act inasmuch as its conduct was in the nature of an exaction for services which are not performed or not to be performed.

Respondent's answer denied the material allegations of the complaint, and asserted that it lawfully engaged in area standards picketing. On May 21 and 22, 1997, a hearing was held before me in Brooklyn, New York.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following<sup>2</sup>

## FINDINGS OF FACT

### I. JURISDICTION

TDX, a New York corporation, having its office and place of business at 121 West 27 Street, New York City, has been engaged in providing construction management and engineering services in the construction industry. During the past year, TDX has performed services valued in excess of \$50,000 for various enterprises located in New York, each of which enterprises is directly engaged in interstate commerce and meets a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

Respondent admits and I find that TDX is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits that it is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### THE FACTS

##### A. Background

The Empire State Development Corp. (ESDC) is a public corporation which had overall responsibility for a large project consisting of the construction of 19 high-rise structures in Long Island City, New York, called the Queens West (QW) project.<sup>3</sup>

Queens West Development Corporation (QWDC), a state agency and subsidiary of ESDC, had direct responsibility for the construction effort. Bids were awarded to five companies for stage I of the project, which is involved herein.

<sup>1</sup> Respondent's answer denied the filing and service of the charges, but admitted receiving a copy of the charges. The formal documents in this proceeding establish that the charges were properly filed and served as alleged.

<sup>2</sup> The General Counsel's unopposed motion to include p. 2 in GC Exh. 6, the Local 282 New York City Heavy Construction & Excavating Contract for 1993-1996, is granted.

<sup>3</sup> The chairman of the ESDC, Charles Gargano, reports directly to the governor of the State of New York.

### B. TDX

TDX, which supervises the project, coordinates the work of the contractors, ensuring that the work performed is done in accordance with the contracts, including that the proper materials are being used, and that the work conforms with the drawings. TDX also processes progress reports. TDX operates pursuant to a tri-venture between it, URS, and HRAD. The venture employs four employees at the jobsite, consisting of a project manager named Prakash Shah, two project superintendents, and one secretary. Shah and the superintendents, all of whom are professional civil engineers, coordinate and supervise the work of the four contractors set forth below. Shah has a field office at the site.

TDX first had preconstruction responsibilities, in which it reviewed designs for the construction and decided upon the constructability of the structures, researched the references of the bidders, and reviewed the bids.

Later, it had construction responsibilities, in which it supplied construction observers and supervisors, as set forth above, to ensure that the contractors performed the work according to their contracts. In this regard, TDX received monthly progress reports from the contractors, which the engineers reviewed, and then submitted to QWDC for payment.

TDX does not direct the contractor's day-to-day work, and does not review its safety reports. However, TDX makes certain that the safety plan is submitted by the contractor and that the contractor follows the plan. TDX receives no deliveries of materials on the site. The contractors do so, but TDX does not schedule those deliveries, direct the trucks as they arrive, or unload them. Those functions are the responsibility of the contractors.

*Bedford/PCS* is responsible for the construction of a park and architectural finishes at the piers.

*Cruz Construction* is responsible for the infrastructure of the project—the construction of the roadways and the installation of utilities.

*E. Daskal Corp.* is responsible for repainting the gantry structures which are used to raise and lower railroad freight cars from barges.

*Weeks Marine, Inc.* is responsible for removal of existing piers and the construction of bulkheads and new piers.

##### C. The Events Leading up to the Picketing

Respondent has two industrywide collective-bargaining agreements with New York building contractors. The "high rise contract" applies to the erection of building superstructures, and the "heavy construction & excavating contract" covers the construction of engineering structures and building foundations.

TDX is a party to the high-rise contract, but not to the heavy construction contract.

Respondent's answer admits the complaint allegation that "at no time since work commenced at the QW jobsite has TDX or the joint venture employed any building trades craft employees, including truck drivers or heavy material haulers, at the QW jobsite."

Nevertheless, as set forth in Respondent's answer, on various dates in September and October 1996, Dennis Gartland, Respondent's secretary-treasurer, asked TDX to employ an onsite

steward (OSS) pursuant to TDX's high-rise collective-bargaining agreement with Respondent.

TDX refused to employ an OSS, and by letter dated October 10, 1996, Gartland scheduled a meeting of the Local 282 management disputes panel to hear a claim that TDX refused to employ an OSS pursuant to the high-rise contract.

On October 22, the panel heard the dispute, and decided that the high-rise contract "does not cover or apply to" the work that TDX was performing at the QW site. James Jones, the president of TDX, testified that at the panel meeting, either Gartland or Robert Haesecker, Respondent's vice president, told him that if the "problem" concerning an OSS was not solved, there could be or would be a "potential area practice picket line."

As set forth above, TDX has a high-rise collective-bargaining agreement with Respondent. Ninety percent of its work is high-rise work. TDX is not a party to the heavy construction contract with Respondent, and has not been asked to sign such an agreement. Nor has TDX been asked by Respondent to recognize it as the bargaining representative for its employees at the QW site. Respondent has not filed a representation petition seeking to represent any employees at the jobsite.

On October 24, 2 days after the panel meeting, Respondent Official Gartland visited the jobsite, and told TDX project manager Shah that the Teamsters wants to "put a man on the site." Gartland gave Shah his business card, which was sent to Laurence Ford, an employee of ESDC, and the project manager at the QW site.

Ford testified that he called Gartland on October 24, and was told by Gartland that "we have a problem," in that a "site representative," meaning an OSS, must be present at the site because Respondent's "trade agreements" require an OSS where the cost of the construction exceeds \$14 million, which was the case here, according to Gartland.<sup>4</sup> Gartland's testimony was to the same effect—that he told Ford that a site representative is required by Respondent's trade agreements.

Ford replied that QWDC is a state agency bound by prevailing wage law, and not local trade agreements, and told Gartland that TDX was hired as the construction manager, but does not hold any of the construction contracts, and was not responsible for the hire of any employees.

Gartland testified that during that conversation, they discussed the duties of an OSS, with Gartland explaining that such a person would be under the direction of the employer and would perform whatever driving work was required.

The meeting concluded with Ford telling Gartland that he would check with his superiors and contact Gartland.

<sup>4</sup> The heavy construction contract provides that the "total gross cost of all construction must be at least \$14 million," but that "on large public projects, where bids are let in separate 'segments' or bids, the standard of . . . \$14 million shall apply to single bid jobs." Respondent argues that the standard was met since the cost of the total construction exceeded \$14 million. In fact, the QW project was bid in separate segments, with each of the five contractors bidding separately. None of the five bids was for at least \$14 million.

The General Counsel and the Charging Party argue that the standard was not met since no single bid equaled that sum. I need not resolve the dispute since I find a violation in any event.

On October 30, Ford advised Gartland that his position remained the same as set forth in their prior conversation, to which Gartland replied that "I'm going to have to do what I have to do."

Respondent's International trustee Gary LaBarbera made the decision to picket the jobsite because (a) the jobsite had a total cost of over \$14 million, and therefore an OSS was required pursuant to the heavy construction contract, (b) TDX did not have a heavy construction contract with Respondent, and was therefore considered by him to be a "nonunion" contractor,<sup>5</sup> and (c) in order to protect Respondent's members and signatory contractors from competition by contractors who are not required to include in their estimate for the job the cost of an OSS.

On December 6, Respondent began to picket the QW jobsite with signs stating:

International Brotherhood of Teamsters Local 282 wishes to notify the public & residents of the community that TDX Construction Corp. is unfair to Local 282 members and their families by not complying with area wide standards!!!!

Local 282 does not seek recognition of TDX Construction Corp.

The picketing continued until January 17, 1997, with the same signs.

John Melia, the director of public affairs for ESDC testified that on December 6, he phoned LaBarbera and asked that the picket line be temporarily moved so as not to interfere with a public "topping off ceremony" which was to be attended by various New York City and State officials and media representatives.

According to Melia, LaBarbera told him that "the problem" was that Respondent "was owed an onsite steward job somewhere at the Queens West site" and that the picket line "could go away if that job were taken care of."

LaBarbera denied saying that, and instead stated that he told Melia that this was an area standards issue, and that pursuant to that doctrine, Local 282 "should have an OSS employed on that jobsite to protect [its] members and legitimate contractors."

I credit Melia. In fact, the picket line was withdrawn when contractor Cruz later employed an OSS.

#### *D. The Onsite Steward*

The heavy construction contract states that the OSS "shall be appointed by the Union from the seniority list of the Employer. . . . He shall handle all grievances involving the application of this Agreement on the jobsite. He shall be allowed a reasonable amount of time to conduct Union business." The working duties of the OSS, according to the contract, shall include ". . . the normal duties of a Teamster, the hauling of materials . . . and the coordination of safety efforts relating to Teamsters on the site." LaBarbera added that the OSS also hauls materials to the site, moves materials on the site, and helps coordinate deliveries of materials on the site. LaBarbera

<sup>5</sup> LaBarbera later changed his testimony to state that TDX's nonunion status was not a factor in his decision to picket the site.

noted that the OSS was not limited to those duties, and that he was at the “direction” of the employer.

LaBarbera testified that the only companies which employ an OSS are those which have contracts with Respondent because a contract with Respondent is required in order to collect pension and welfare payments. Further, one of the conditions required in the employ of an OSS is to make contributions to Respondent’s funds.

Nevertheless, LaBarbera stated that TDX would not have had to sign a contract with Respondent in order to employ an OSS or a “comparable employee” because Respondent only sought to have the area standard met—that an employee be hired and paid \$40 per hour. That is the rate of pay, including wages and benefits, of an employee covered by Respondent’s heavy construction contract. LaBarbera conceded, however, that in order to make contributions to the funds, the employer must be a signatory to a contract with Respondent.

LaBarbera admitted that TDX employed no one at the jobsite who performed work normally done by employees represented by Respondent, and there was no one at the entire site who performed work as an OSS.

#### E. The Picketing

As set forth above, the picket signs stated that TDX was not complying with area standards. Union Official LaBarbera testified that the only area standard that TDX failed to meet was its failure to employ an OSS.

During the picketing, no employee of contractor Cruz worked. On January 17, Cruz began employing an OSS. That employee was on Cruz’ seniority list. Upon the employment of an OSS, the picket line was immediately withdrawn. LaBarbera testified that the picket line was withdrawn since the area standard was met.

Respondent argues that although TDX did not employ anyone on the jobsite who could perform the work of an OSS, it had the theoretical capacity to do so. Indeed, Ford testified that the contract between TDX and ESDC did not prohibit its employing such an individual. However, in order to hire such a person, TDX would have to obtain approval from ESDC and QW in order to be compensated for that person’s work.

#### F. Analysis and Discussion

##### The Threat to Picket and the Picketing

The complaint alleges that on October 22, LaBarbera unlawfully threatened TDX that it would picket the QW jobsite.

As set forth above, TDX Official Jones credibly testified that on October 22 at the panel meeting at which it was decided that the high-rise agreement did not apply to the work being performed by TDX, either Gartland or Haeseker told him that if the “problem” concerning an OSS was not solved, there could or would be a “potential area practice picket line.” Haesaker did not testify, and Gartland did not deny this alleged statement.

It is clear that Respondent did threaten to picket the jobsite as testified by Jones. Unable to obtain its objective of requiring the hire of an OSS through the panel meeting, Respondent’s official threatened to use a picket line in order to achieve its goal. Although an “area practice” picket line was identified as the type of picket line being considered, inasmuch as I find that

the picket line was not a lawful area standards picket line, Respondent’s identification of it as such does not make it a lawful statement.

Section 8(b)(7)(C) prohibits picketing or threatening to picket for a recognitional or organizational object where the picketing has, as here, been conducted in excess of 30 days. *Mine Workers District 17 (Hatfield Dock)*, 302 NLRB 444, 445 (1991).

Section 8(b)(7)(C) in relevant part prohibits a labor organization from picketing an employer where an object thereof is forcing or requiring it to recognize or bargain with the union when the picketing has been conducted without a representation petition being filed within a reasonable period of time not to exceed 30 days from the start of the picketing. Recognition or bargaining need not be the sole object for a violation to occur. *Hotel & Restaurant Employees Local 274 (Stadium Hotel Partners)*, 314 NLRB 982, 984 (1994).

Picketing for an object of recognition or bargaining, if such picketing is not accompanied by a petition being filed within 30 days, is proscribed by Section 8(b)(7)(C) of the Act. However, picketing for other objects is not proscribed by that section. *Hod Carriers Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1156 (1962).

That section applies “even if there are legitimate purposes for the picketing; it is sufficient to make out a violation of Section 8(b)(7) if one of the union objects is recognitional.” *State Employees IATSE Local 15 (Albatross Productions)*, 275 NLRB 744, 745 (1985).

The evidence establishes that an object of the threat to picket, and the picketing was to require TDX to employ and OSS and recognize the Union. An OSS is a classification of employee defined and provided for in Respondent’s collective-bargaining agreements. TDX could not employ an OSS and pay him benefits without being a signatory to a contract with Respondent.

Inasmuch as the high-rise contract was held inapplicable to the work performed by TDX at the QW jobsite, it is clear that Respondent sought to obtain its objective of securing an OSS at the site by requiring TDX to become a signatory to the heavy construction agreement.

Thus, no employee may occupy the title “OSS” in the absence of an employer accepting the Respondent’s contractual terms and executing a collective-bargaining agreement with it. Accordingly, Respondent’s picketing was unlawfully done in order to obtain that result. The OSS’s duties include acting as the Respondent’s onsite representative for the handling of grievances, and pursuant to the heavy construction contract, must be allowed time to conduct union business.

Although it is true that the picket signs’ legend stated that the picketing was done to advise the public that TDX was not complying with area standards, and that Respondent was not seeking recognition from TDX, nevertheless such “self-serving legends . . . is [not] conclusive evidence of the real objective of the picketing. *Electrical Workers Local 953 (Erickson Electric)*, 154 NLRB 1301, 1305 (1965).

Here, a recognitional objective is present in Respondent’s unlawful threat to picket TDX upon being advised that the

high-rise agreement was not applicable, and that its attempt to have an OSS hired through that agreement was unsuccessful.

Inasmuch as the picketing, which took place for a recognitional object, continued here for more than 30 days without a petition having been filed, the picketing, which was for a recognitional object, violated Section 8(b)(7)(C).

#### G. Respondent's Defenses

##### The Alleged Area Standards Picketing

Although picketing for a recognitional purpose is prohibited by Section 8(b)(7)(C), picketing for other objects is not proscribed by that section. *Blinne Construction Co.*, supra.

In *Food For Less*, 318 NLRB 646, 648 (1995), the Board stated that:

Where the General Counsel has established a prima facie case that a respondent union's picketing is in violation of . . . 8(b)(7), the burden shifts to the . . . union to prove that its picketing, assertedly in support of area standards, was based on a bona fide investigation and evaluation of comparative labor costs. In this way, the respondent seeks to avoid an inference that the true objective of its picketing was an organizational or recognitional one proscribed by the Act.

Picketing in order to require an employer to maintain area standards, that is to conform its standards of employment to those prevailing in the area, does not constitute recognitional picketing. *Hod Carriers Local 41 (Calumet Contractors Assn.)*, 133 NLRB 512 (1961).

LaBarbera testified that when he authorized the placement of the picket line, he did not possess any information that teamsters employed at the site were not receiving the prevailing wage. He also testified that he was aware that union contractors bid upon the project but were unsuccessful, but could not name any. The only document produced by Respondent at hearing concerning the bidders, was one which identified TDX as the successful bidder. In fact, no contractor which is a signatory to the heavy construction agreement bid on the project.

Signatories to the heavy construction contract are members of the General Contractors Association (GCA). Of the nine bidders for the project, LaBarbera was not aware that any of them were members of the GCA. This undercuts his contention that the picket line was established, in part, in order to protest TDX's competitive advantage over the Union contractors in bidding on the project because TDX did not include in its bid the \$80,000 annual labor cost for the OSS, which the signatory contractors were required to do. In fact, no signatory to the heavy construction contract bid on the project.

I accordingly find that Respondent has not proven that its picketing, assertedly in support of area standards, was based on a bona fide investigation and evaluation of comparative labor costs. What it sought was the employment of an OSS. As set forth above, the only way that could be accomplished was by TDX executing a heavy construction agreement which would provide for the payment to the funds for the benefit of the OSS.

I therefore find that Respondent has not proven that it has engaged in lawful area standards picketing.

#### H. The One-Person Unit

Respondent further argues that, even assuming its picketing had a recognitional object, the picketing sought to compel recognition in a one-person bargaining unit. Accordingly, inasmuch as the Board would not hold an election in a one-person unit, Section 8(b)(7)(C) is inapplicable. *Operating Engineers Local 181 (Steel Fab)*, 292 NLRB 354 (1989); *Plumbers Local 195 (Neches Instruments Service)*, 221 NLRB 1226 (1975).

However, the situation in the instant case is different. Here, TDX employed no statutory employees, and Respondent was aware of that fact when it commenced picketing. Respondent engaged in picketing in order to require TDX to employ an OSS and to enter into a prehire agreement pursuant to Section 8(f) of the Act.

The Board has held that a construction industry union may not picket for recognition in a unit having no employees in order to obtain a prehire contract under Section 8(f) of the Act. *Operating Engineers Local 542 (Noonan, Inc.)*, 142 NLRB 1132, 1134-1135 (1963); *Laborers Local 1184 (NVE Constructors)*, 296 NLRB 1325, 1327 (1989). In addition, picketing for more than the 30-day time limitation set forth in Section 8(b)(7)(C) under these circumstances is unlawfully coercive. *NVE*, supra at 1330.

The legislative history of Section 8(f) . . . makes it clear that a union cannot use coercive techniques, such as picketing, to force an employer to sign such an agreement. To permit what Respondent sought to do here would be to give license to unions to compel employers in the construction industry to sign prehire agreements. This is clearly repugnant to both the spirit and the letter of the law. *Noonan*, supra at 1135. See *NVE Constructors*, supra at 1330.

I accordingly find no merit in Respondent's contention.

##### 1. The alleged violation of Section 8(b)(6) of the Act

The complaint also alleges that Respondent's unlawful threat to picket and picketing attempted to cause TDX to pay money to an OSS in violation of Section 8(b)(6).

Section 8(b)(6) makes it an unfair labor practice for a labor organization to:

Cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

Prior cases which dealt with this issue all involved situations where work was actually performed. *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100 (1953); *NLRB v. Gamble Enterprises*, 345 U.S. 117 (1953); *New York District Council of Carpenters (Graphic Displays)*, 226 NLRB 452 (1976); *Teamsters Local 456 (J. R. Stevenson Corp.)*, 212 NLRB 968 (1974).

However, the statute also proscribes a union's "attempt to cause" an employer to pay money for services which are not performed or not to be performed. Accordingly, Section 8(b)(6) applies here to Respondent's attempt to obtain the hire of an OSS.

The duties of an OSS, according to the heavy construction contract and LaBarbera's testimony include the normal duties of a teamster, the hauling of materials, the coordination of safety efforts relating to teamsters on the site, and processing of grievances relating to the collective-bargaining agreement.

TDX employs three professional engineers and one secretary. It employs no drivers, it does not haul materials, and does not coordinate safety efforts relating to Teamsters on the site. In addition, TDX receives no deliveries of materials, and does not schedule the receipt of deliveries by other contractors.

As set forth above, the engineer's function is to oversee the project and ensure that the four site contractors perform their work according to the job specifications.

The Board has held that, in the absence of a collective-bargaining relationship, in order to avoid the proscription of Section 8(b)(6), the union must make a "bona fide offer of the competent performance of relevant services." *Stevenson*, supra; *Metallic Lathers Local 46 (Expanded Metal Engineering Co.)*, 207 NLRB 631 (1973).

In *Metallic Lathers*, the union demanded that the employer hire a lather to do work already being performed by a teamster. When the union picketed, the employer hired a lather who performed only office duties. The Board, in finding a violation, stated that the employer did not have "even any prospective need for the services of a lather," and that the union's demand did not constitute a "bona fide offer of competent performance of relevant services." *Metallic Lathers*, supra at 636.

Similarly, in *Stevenson*, the Teamsters required the employer to retain a union steward even though the employer employed no teamsters, and no employees performing teamster work. The steward's only work consisted of checking the union cards of drivers entering the construction site. As in the instant case, the Board noted that the union's demand was made with knowledge that the employer did not have "even a prospective need for the specialized services" of a teamster, and thus the demand fell "considerably short of being a bona fide offer of the competent performance of relevant services." *Stevenson*, supra at 971.

As in those cases, here there was no collective-bargaining relationship between Respondent and TDX for the work at the QW jobsite. Respondent demanded that an OSS be hired notwithstanding that TDX employed no employees who performed such duties, did not have "even a prospective need" for such services, and did not desire such services.

Thus, none of the functions of an OSS, which included hauling materials, helping coordinate deliveries, handling grievances and checking the union books of other teamsters, are functions performed by TDX, and are not relevant to the responsibilities of that company.

TDX does not receive materials, direct the trucks delivering them, or schedule the deliveries. It plays no role in the formulation of the contractors' safety plan, but merely receives it, and makes certain that the plan, as well as other aspects of the contractor's work, are followed.

LaBarbera testified that TDX, as construction manager, was responsible for construction on the jobsite. Although conceding that TDX employed no employees who actually moved materials on the site, he stated that TDX as construction manager was responsible for moving material on the site in the following

manner: If one of TDX's engineers saw pipe being moved in an improper or unsafe way, he had the authority to direct that the pipe be moved properly.

This tenuous argument cannot support a finding that Respondent offered relevant services to TDX by demanding that an OSS be hired. In the example cited, TDX had the overall supervisory responsibility and authority to ensure that the work, performed by the contractors, was properly done. The OSS would not have that authority, and TDX's employees would not move the material itself.

Respondent, being aware that TDX had no employees who could perform the services of an OSS, and being told by TDX that it had no need for and did not desire the services of an OSS, nevertheless demanded the hire of one, and picketed the jobsite in order to enforce its demand. Respondent's demand was therefore not a bona fide offer of the competent performance of relevant services, and constituted an attempt to cause TDX to pay an exaction for services which are not performed or not to be performed in violation of Section 8(b)(6) of the Act.

Respondent's argument that TDX had the ability to employ someone who could perform the work of an OSS, and was not prohibited from doing so by its contract with ESDC only illustrates the violation here. TDX had no need for the services of an OSS, had not hired such a person, and had not included in its bid a sum for such a person's services. If it did so in response to the picketing it would be responding to the coercive nature of Respondent's actions in paying for services it did not need or want. It is that type of conduct to which Section 8(b)(6) is addressed.

#### CONCLUSIONS OF LAW

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

2. Respondent, Local 282, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening TDX that it would picket the QW jobsite, Respondent violated Section 8(b)(7)(C) of the Act.

4. By picketing TDX and causing TDX to be picketed at the QW jobsite from December 6, 1996, to January 17, 1997, Respondent violated Section 8(b)(7)(C) of the Act.

5. By threatening to picket, and by picketing TDX at the QW jobsite, and by attempting to force and require TDX to hire and employ an OSS at the QW jobsite and to recognize and bargain with Respondent as the representative of the OSS at the QW jobsite, Respondent violated Section 8(b)(7)(C) of the Act.

6. By the conduct engaged in above, Respondent attempted to cause TDX to pay money and other things of value to an OSS to be selected by Respondent to be employed by TDX at the QW jobsite in violation of Section 8(b)(6) of the Act.

#### REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

ORDER

The Respondent, Local 282, International Brotherhood of Teamsters, AFL–CIO, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing, causing to be picketed or threatening to picket TDX Construction Corp. at the Queens West jobsite, where an object thereof is forcing or requiring TDX to hire and employ an onsite steward, and to recognize or bargain with Respondent as the collective-bargaining representative of an onsite steward, notwithstanding that a question concerning representation under Section 9(c) of the Act could not appropriately be raised, and without a valid petition under Section 9(c) having been filed within a reasonable period of time from the threat to picket or the commencement of the picketing, and notwithstanding that at no material time has Respondent been certified by the Board as the collective-bargaining representative of any bargaining unit of employees of TDX at the Queens West jobsite.

(b) Attempting to cause TDX to pay money and other things of value to an onsite steward to be selected by Respondent to be employed by TDX at the Queens West jobsite, in the nature of

an exaction for services which are not performed or not to be performed.

(c) 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 designed to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in New York, New York, copies of the attached notice marked “Appendix.”<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by TDX, if willing, at all places where notices to employees are customarily posted.

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

<sup>6</sup> 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.

<sup>7</sup> 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.”