

Wolgast Corporation and Local 706, United Brotherhood of Carpenters & Joiners of America, AFL-CIO. Case 7-CA-42474

June 5, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On October 25, 2000, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief. In addition, the Associated Builders and Contractors, Inc. filed a brief as amicus curiae in support of the exceptions filed by the Respondent.

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 as modified and to adopt the recommended Order as modified.

In October 1999,² the Respondent, a nonunion general contractor, was engaged to construct a theater complex in Birch Run, Michigan. Respondent hired 10 subcontractors to work on this job, including Acoustical Arts, Inc. Local 706, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, represented Acoustical Arts' carpenter employees. On October 14, Local 706 organizer Leon Turnwald visited the jobsite to investigate a safety complaint of member Ray Cotton. According to Turnwald's credited testimony, the Respondent's project superintendent, Brian Grandy, ordered Turnwald off the jobsite and engaged in other physical conduct designed to interfere with Turnwald's access to Acoustical Arts' employees on the jobsite.

The contract between Acoustical Arts and Carpenters Local 706 contains a union-access clause stating that

[b]usiness representatives shall have access to all jobs at all times where possible. A Representative of the Michigan Regional Council of Carpenters shall have the right to visit the job during working hours to interview the Employer, Steward, or men at work but shall not hinder the progress of work.

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

² All dates hereafter refer to 1999, unless otherwise indicated.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by interfering with a Local 706 official's access to the jobsite pursuant to the access provision in the Union's collective-bargaining agreement with Acoustical Arts.³ We agree with the judge that the holding in *CDK Contracting Co.*, 308 NLRB 1117 (1992), is controlling in this case. In *CDK*, we harmonized our holding with the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502, U.S. 527 (1992). We find no merit to the Respondent's and amicus' contention that *CDK* was wrongly decided or is in conflict with *Lechmere*.⁴

We also find no merit to the Respondent's contention that the Union was not entitled to access because there were no Acoustical Arts carpenter employees on the jobsite on October 14. The access provision of the contract does not restrict the Union's visitation right to days when employees it represents are present at the jobsite and, moreover, the purpose of Union Official Turnwald's visit on October 14 was, as noted above, to investigate a safety complaint lodged by a union member who worked on the jobsite the day before.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. Respondent violated Section 8(a)(1) of the Act when it unlawfully refused and otherwise interfered with Local 706, United Brotherhood of Carpenters & Joiners of America, AFL-CIO's right to enter the Cinema Hollywood jobsite."

³ Turnwald was accompanied by Robert Horner, a representative of a Lathers local of the Carpenters and Joiners Union. The judge also found that the Respondent unlawfully interfered with Horner's access to employees he represented. The access provision on which the judge relied is contained in a 1989 contract between Lathers Local 1028 and Acoustical Arts. In 1996 Local 1028 merged into Local 1045 of the Carpenters and Joiners Union. There is insufficient evidence in the record to find that the access provision in the 1989 contract remains in effect. Therefore, we do not adopt this violation. We shall modify the conclusions of law, recommended Order, and notice to reflect the violation we are finding.

⁴ In such cases as this one, where the exercise of Sec. 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, the respondent bears a threshold burden to establish that it possessed a property interest which entitled it to exclude individuals from the property. See *R & R Plaster & Drywall Co.*, 330 NLRB 87 (1999); *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080, 1095 (9th Cir. 1999). The judge did not address whether the Respondent met that burden here. However, no party has excepted to the judge's failure to address this issue. Additionally, as indicated above, we are adopting the violation found by the judge with respect to Local 706, and ordering the Respondent to cease and desist from interfering with Local 706's right to enter jobsites to communicate with represented employees and from interfering with the exercise of Sec. 7 rights in any like or related manner. Under these circumstances, we find it unnecessary to pass on the issue of the Respondent's property interest.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wolgast Corporation, Saginaw, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Unlawfully refusing or otherwise interfering with Local 706, United Brotherhood of Carpenters & Joiners of America, AFL–CIO’s right to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of representing employees under its collective-bargaining agreement with the Union.”

2. Substitute the following for paragraph 2(a):

“(a) On the Union’s request, permit it to enter the Cinema Hollywood jobsite or any other jobsite for the purposes of representing the employees of Acoustical Arts, Inc. under its collective-bargaining agreement with the Union, provided, however, that Respondent is not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access.”

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

APPENDIX

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 mail this notice to the employees of Acoustical Arts, Inc., who worked in 1999 on the Cinema Hollywood jobsite in Birch Run, Michigan.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully refuse or otherwise interfere with Local 706, United Brotherhood of Carpenters & Joiners of America, AFL–CIO’s right to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of representing employees under its collective-bargaining agreement with the Union.

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

WE WILL, on the Union’s request, permit it to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of representing employees of Acoustical Arts, Inc., under its collective-bargaining agreement with the Union, provided, however, that we are not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access.

WOLGAST CORPORATION

Joseph Canfield, Esq., for the General Counsel.
David John Masud, Esq. (Masud, Gilbert & Patterson, P.C.),
of Saginaw, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On October 14, 1999, Local 706, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, filed a charge in Case 7–CA–42474 against Wolgast Corporation (the Respondent).

On December 28, 1999, the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint which alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when on October 14, 1999, Respondent unlawfully interfered with the rights of the Charging Party Union, Local 706, and Local 1045 of the United Brotherhood of Carpenters & Joiners, to access to a jobsite under contractual provisions the Unions had with Acoustical Arts, Inc., a subcontractor working for Respondent on the Cinema Hollywood jobsite in Birch Run, Michigan. According to the complaint Respondent interfered with the Unions’ right to access by actions including ordering the Unions’ business agents off the jobsite, attempting to forcibly lead a union agent off the jobsite and blocking his ingress into an area on the jobsite, and physically disrupting the activities of the Unions’ agents and their interactions with employees.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Saginaw, Michigan, on March 30 and 31, and June 13, 2000.

I find for the General Counsel and conclude that Respondent violated the Act as alleged in the complaint.

Based on the entire record in this case to include posthearing briefs submitted by the General Counsel and Respondent on August 1, 2000, and on my observation of the witnesses and their demeanor I make the following

I. FINDINGS OF FACT

At all material times, Respondent, a corporation, with an office and place of business in Saginaw, Michigan, has been engaged as a general commercial contractor in the construction industry.

During the calendar year ending December 31, 1998, Respondent purchased goods and materials in excess of \$50,000 from points located outside the State of Michigan and caused

the goods and materials to be shipped directly to its building sites within the State of Michigan.

Respondent admits, and I find, that at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that at all material times, a contract between Respondent and Accoustical Arts, Inc. has been in effect whereby Accoustical furnishes construction services to Respondent at the Cinema Hollywood jobsite, located in Birch Run, Michigan.

II. LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that at all material times, the Charging Party Union and Local 1045, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Unions) have been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Facts

The Respondent, a general contractor, had an \$800,000 contract to add four theaters to a Cinema Hollywood movie complex in Birch Run, Michigan.

Respondent is nonunion and had 10 subcontractors working for it at the Cinema Hollywood jobsite. One of the subcontractors was Accoustical Arts, Inc., which had an \$80,000 contract with Respondent to perform certain accoustical work at the jobsite. The contract between Respondent and Accoustical Arts was a bid contract (so much to do the job) rather than a time and material contract.

Accoustical Arts has contracts with the two Locals involved in this case, which contracts were in effect in October 1999.

Accoustical Arts' contract with the Charging Party Union Carpenters Local 706 contains in article V, section (c) the following language:

Business Representatives shall have access to all jobs at all times where possible. A Representative of the Michigan Regional Council of Carpenters shall have the right to visit the job during working hours to interview the Employer, Steward, or men at work but shall not hinder the progress of the work.

Accoustical Arts had a contract with Carpenters Local 1028-L, which merged into Local 1045. In its contract with Local 1028-L and then with Local 1045 once Local 1028-L merged into Local 1045 contained the following language in article VIII, section 1:

Authorized representatives of the Union shall have the right to visit the job or jobs of the Employer where journeymen Lathers and Apprentices are employed, to investigate conditions at any time, but they shall not interfere with the progress of the work. The Contractor shall not be held liable for any representative of the Union visiting the job.

Both Local 706 and Local 1028-L, which later merged in 1996 into Local 1045, were Locals under the jurisdiction of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO. Carpenters and carpenter apprentices were members of Local 706 and lathers and lather apprentices were members of

Local 1045. Both Locals shared space in the same office in Saginaw and the same secretary in that office handled the paperwork for both Locals.

General Counsel's Exhibit 2A is the controlling contract between Accoustical Arts and Local 706. General Counsel's Exhibit 2B is the controlling contract between Accoustical Arts and Local 1028, which later became Local 1045 as reflected in General Counsel's Exhibit 14. General Counsel's Exhibit 4 is the signatory page wherein Accoustical Arts agreed to be bound by General Counsel's Exhibit 2B.

Respondent's Exhibit 2 is a contract between Accoustical Arts and Local 1045 which covers parts of the State of Michigan not involved in this litigation. As General Counsel's Exhibits 5 and 6 (Fringe Benefit Reports) and the testimony at trial reflect it was General Counsel's Exhibit 2B which was the applicable contract governing lather and lather apprentice employees of Accoustical Arts in October 1999 at the Cinema Hollywood jobsite.

B. Events on October 13 and 14, 1999

The unfair labor practice allegations are alleged to have occurred on October 14, 1999. But the events of October 14, 1999, are best put in perspective by looking at the events of both October 13 and 14, 1999.

The Union went to the Cinema Hollywood jobsite to visit employees of Accoustical Arts, Inc.

Accoustical Arts was at the site between the first week in October and November 12, 1999, when the job ended. The Union visited the site on only October 13 and 14, 1999.

This is a case that turns in large part on credibility. The principal witnesses for the General Counsel on what occurred on October 13 and 14, 1999, are Leon Turnwald, an organizer for Local 706, and Robert Horner, an organizer out of Local 1045, a statewide local, but assigned to the Local 706 area of Michigan which includes Saginaw and Birch Run. I found both Turnwald and Horner to be very credible witnesses. They impressed me as honest men and I credit their testimony.

On October 13, 1999, Turnwald and Horner visited the Cinema Hollywood jobsite around 11 a.m. They went there to see a new member of Local 706, Ray Cotton, who had just started work for Accoustical Arts to see how he was getting along and to look for a couple of other members, Mark Bigelow and Rusty Schroder, to see if they were working at that jobsite. Neither Bigelow nor Schroder were working at that site and Ray Cotton had shown up to go to work but left the job before Turnwald and Horner got there according to Foreman Tim Paquette.

According to Turnwald he encountered Brian Grandy at the jobsite and had a confrontation with him. Again, this is October 13 and the unfair labor practice is alleged to have occurred on October 14. Brian Grandy was the project superintendent for Respondent and is admitted by Respondent to be a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act.

According to Turnwald, whom I credit, the following occurred:

A. [Brian Grandy] was up a little ways. There's a long hall way that leads into the main room and he was coming down the hallway.

Q. When, if ever, had you seen Mr. Grandy before?

A. I believe I had met him sometime ago. It would have been on National City Bank on Michigan herein Saginaw.

Q. Was that a job site—

A. Yes.

Q. —you're referring to?

A. Yes.

Q. Okay. So what conversation, if any, was there between you and Mr. Grandy at that point?

A. He recognized me for whatever reason and he was just, you know, what're you doing here, what'd you want, get your business done and get out.

Q. What time did you leave that job site that day?

A. We weren't on that job site that day more than ten minutes and I say ten minutes. You know, it must have taken that long, but, really, in everything that went on, it had to have been less than ten.

Later that day Turnwald called Ray Cotton and asked why he left the job. Cotton told him that he would be required to work on scaffolding that he (Cotton) thought unsafe.

Turnwald later spoke with John Binder, the owner of Acoustical Arts, who said the scaffolding was safe. And Turnwald also learned that they could have and should have signed up Kevin Culbert, a new employee of Acoustical Arts.

The following day, October 14, 1999, Turnwald and Horner went back to the Cinema Hollywood jobsite in order for Turnwald to check on the scaffolding and for Horner to sign up Keith Culbert into the Union as an apprentice lather.

According to Turnwald, whom I credit, this is what happened when he and Horner arrived at the jobsite and encountered Brian Grandy:

Q. Okay. And was there a conversation with Mr. Grandy at that time?

A. Yes.

Q. What did he say?

A. He—he started—he started ranting and raving. He said what the fuck are you guys doing here again.

Q. What was his tone of voice?

A. Very, very loud. Very angry. Very abusive.

Q. How long were you on the job site when you ran into Mr. John Grandy?

A. It couldn't have been over a minute or two.

Q. Okay. What else do you remember him saying?

A. You know, he, basically, he was just screaming, you know, what was our business there and to get the fuck out of here, and I said, well, we've got to talk to our members, and he said you talk to those ass holes out in the parking lot, and I said no, I'm going to talk to them here, and he started screaming that he was going to call Pat Wolgast and he would throw me out.

Q. What, if—what, if anything, else do you remember him saying?

A. I reached in my pocket and tried to hand him a quarter and I said here's a quarter, go call Pat, I've got work to do.

Q. Other than Mr. Grandy screaming, I think you described

A. Yes.

Q. —what, if anything else—was there any other conversation?

A. He grabbed on my arm and tried to lead me down the hallway on the way out.

Q. When you say grabbed on your arm, what do you—can you describe for the court how he did that?

A. Just he was standing in front of me. He grabbed at my arm to pull me.

Q. He grabbed at your arm with his hand?

A. Right.

Q. One hand or two hands?

A. One hand.

Q. Okay. And you say he sort of pulled you?

A. Yes.

Q. Pulled you where?

A. Tried to pull me down the hall.

Q. And what happened?

A. I just brushed it off and at that time Mr. Horner came through and kind of stepped in between us.

Q. Ad what happened then?

A. He says don't worry about giving him a quarter, he's got a cell phone, he can go make a call.

Q. Okay.

A. And Mr. Grandy turned around and walked down the hallway the other way.

Q. Other than touching you that, day, who else, if anyone, did Mr. Grandy touch?

A. I believe Mr. Horner, because, when he came in, he—he was talking to Mr. Horner as he came down the hallway to—towards me.

Q. Okay. When you say you believe, did you see that?

A. Yes. Because they—they turned the corner and they were both right there.

Q. And I asked if he touched anyone else and you said Mr. Horner. In what manner did he touch Mr. Horner?

A. I believe he was leading Mr. Horner into that room.

Q. By leading, what do you mean?

A. By the arm.

Q. So you say you—Did you hand Mr. Grandy a quarter or no?

A. No. I reached out to gesture and he didn't take it.

Q. What happened then?

A. Then we came back. The gentleman—

Q. Let me ask you what happened with Mr. Grandy and yourself then. Did you remain together?

A. No. Mr. Grandy walked back up the hallway.

Q. Okay. So where did you go then?

A. Back into the main room. The—who I found out later to be Kevin Culbert came back into the room and I asked him who he was and he was the new hire for Acoustical.

Q. Kevin Culbert?

A. Yes. I believe that was it.

Q. And so what happened when you went into the main room?

A. We had some paperwork there for him to fill out. His member—

Q. Mr. Culbert?

A. Yes.

Q. Okay.

A. His membership and, oh, his health benefit cards and a form for the apprenticeship. He was coming in as an apprentice and he had to fill out this form for that. So there was a make-shift table. Below the table I believe it was bats of insulation, some things like that, a large piece of plywood or some kind of Durasand board or something that we was using for a tabletop and he commenced to fill out the paperwork.

Q. Okay. And, while he was doing that, was, if anything happened?

A. I believe sometime in the process of doing that the owner of Accoustical Arts came in, Mr. Binder, and he set his tools down on there. There were screws and other things and—

Q. Mr. Binder set his tools down?

A. Yes. He carried in his tool belt. And there was some screw guns there and some other things.

Q. So that Mr. Binder comes in, lays his tools down on this make-shift desk top, and Mr. Culbert is filling out the papers?

A. Yes.

Q. Did you—was there a conversation with Mr. Binder about you and Mr. Horner?

A. Mr. Horner had a conversation with him like that.

Q. And where did that occur?

A. I believe at that moment those two walked outside to get away from the men there and walked outside the door and went outside the building.

Q. Did you have occasion to talk to Mr. Binder and Mr. Horner outside?

A. Just briefly.

Q. And what caused that?

A. In the process of filling out all the paperwork, all the paperwork was fine except for there was a portion of the apprenticeship. This gentleman was coming in as a lather's apprentice and the lather's apprenticeship school is a little bit different program than the carpenter apprenticeship program is. There was some questions on there that weren't clear to me. So I exited the building to ask Mr. Horner how he should finish filling that out.

Q. And what happened then?

A. Mr. Horner explained to me and he said, well, I'll come back in and show him how do it, and we turned around to go back into the building.

Q. And, going back into the building, you were entering through what?

A. Through the same exit door on the side there.

Q. Okay. And what happened then?

A. Mr. Grandy was standing in the doorway and just, you know, you guys get the fuck out of here, you're not coming back in.

Q. Do you remember anything else he said?

A. I told him we've got work to do in there, and he says, again, if you gotta talk to those ass holes, do it out in the parking lot?

Q. Do you remember anything else that he said then?

A. Just that, if they gotta fill out paperwork, they can do it out in the parking lot, and I said it's a lot warmer in here and I pushed him aside and went back in.

Q. Is there anything else you remember being said then?

A. I just told him I had business to complete in there, I had to go back in and get the paperwork. That's about it.

Q. Okay. So you don't remember at this point other things being said?

A. No.

Q. What, if anything, do you remember Mr. Grandy saying about disrupting work?

A. Right. He had mentioned in through that that you're not going to disrupt, you're not going to stop my guys from working, you're not going to disrupt this job site, and I told him these are not your guys and we're not disrupting the job site and we're not going to bother anybody here, we're not going to be holding anybody up from doing their work.

Q. At that point, how long were you on the job?

A. At that point, possibly—possibly—seven to ten minutes.

Q. Okay. When, if ever, did you have any conversations with any of the contractor's employees?

A. It was just a little bit. Maybe then—They kept—

MR. MASUD: Excuse me. What contractor?

MR. CANFIELD: The contractor's employees.

MR. MASUD: Which contractor?

MR. CANFIELD: Thank you.

Q. By MR. CANFIELD: When, if ever, did you have any conversations with Wolgast employees?

A. Yes. At—at about that point, Mr. Grandy came down with a person that he called Keith and he said to Keith tell him—referring to me—tell him to get out of here, get off the job site, he can't be here.

Q. And what did Keith say?

A. And Keith he just kind of looked at me and rolled his eyes and he said you guys go something to do here, and I says, you know, we're here representing our members, we've got to sign a guy up, we're taking care of union business, and he said something to the effect did you check in, and I says, if we were supposed to check in, it seems like he would have told me that yesterday and we're not checking in, we're going to get this done and go. Keith said he can't throw you off, and Keith walked around to the back and went up and he had a hog grinder. He was grinding some metal.

Q. What a hog grinder?

A. It's a large disc grinder.

Q. Okay. Keith says he can't thrown you off?

A. Yeah.

Q. Who did you understand him to be referring to?

A. Brian.

Q. Okay. Do you know who Keith was?

A. I would say by the nature he may have been a little—a cement man, a cement finisher?

Q. So you don't know who he was?

A. No, I don't.

Q. Okay. So other than Mr. Grandy and, perhaps, Keith, what other Wolgast employees, if any, did you have any conversations with?

A. I didn't have any other conversation with any. I only recognized what I thought to be one other Wolgast on that job and that was a younger guy, dark complexioned, rather large.

Q. Did you have any conversation with him?

A. No.

Q. Okay. So—okay—so let's see. Did the conversation with Grandy and Keith occur after Mr. Grandy was standing in the doorway saying you're not going to come in?

A. I believe that was before that.

Q. So, when Mr. Grandy was standing in the doorway saying you're not coming back in, what happened?

A. I told him I had to go in there and get my paperwork and finish that up, and leaned to one side and I brushed by him, because I made a gesture like I was going to go in close and he leaned that way and, as soon as he did that, I just blew by him.

Q. And what happened when you went inside?

A. We went in there, instructed the apprentice on how to complete finishing it out. There was some conversation as to how much the books would cost, and Mr. Grandy said something to the effect as that's all the fucking union does is take your money, and the young gentlemen filling it out says no, the union's the only way I can get ahead. And we said, boy, you're going to make a great guy, and then Mr. Grandy stated, well, you said to me you wouldn't interfere with anything I had to do here, you weren't going to bother the men, and I said, well, that's right, and he says, well, then, I'm going to clean up this area right here and he reached down and grabbed the work table and flipped it up in the air so all the tools and everything would fall on me.

Q. Other than the tools, what else was on the work table?

A. My hard hat was sitting on the work table. There was screws sitting on the work table. Different things like that.

Q. Where was the paperwork that Mr. Culbert had filled out?

A. That was on there. He was in the process. He wasn't completely done with the paperwork.

Q. So what was Mr. Culbert doing when Mr. Grandy flipped over the table?

A. He was down on his knees. Like he had to be down quite low to be filling out the paperwork.

Q. So he was—he continued—he was continuing to fill out the paperwork when Mr. Grandy flipped the table?

A. He may not have been actually writing, but the paperwork wasn't completed and that's where he was, in the process.

Q. And he was still on his knees at the table?

A. Yes.

Q. And what happened with the—what kind of table top was it? Can you describe it?

A. Again, I think it might have been a piece of—it may have even been a piece of drywall.

Q. How big?

A. 4 x 6. Something. I wasn't—it wasn't a full sheet. If it was a piece of plywood, it was—it was quite dusty. You know, it had to have been in there and, again, it wasn't a full sheet.

Q. So what happened to the table top when Mr. Grandy flipped it?

A. It fell down in front of me. It just caught the edge of my shoes, but the tools and everything fell on me.

Q. And what happened next?

A. And I just, you know, said that was a really a smart thing to do. Mr. Binder came in there and he just kind of stepped in between us and he says, you know, you guys do whatever you gotta do, but these are my tools, you know, let's not be wrecking them. And he—he picked them up.

Q. And then what happened then?

A. Mr. Grandy walked up the hallway and he was up there doing something. The apprentice finished clean—or filling out his paperwork and we left.

Q. Okay. And how long were you on the site, in total, by the time you left?

A. It had to be less than 15 minutes."

Robert Horner's version of events on October 13, 1999 was as follows:

"Q. What time of day did you go?

A. It was before lunch sometime.

Q. And what was your purpose of going there?

A. My purpose in going there was to see Ray Cotton and—

Q. Who was—

A. —and to look for Rusty Schroeder and Mark Bigelow.

Q. What was the purpose of seeing Cotton, though?

A. I had sent him—He had transferred in here from Ohio and I don't remember the town where he transferred, but he had transferred in and I was the only one in the office when he came in that very first day and I told him we could use some ceiling guys and that's what he had expressed to me that he was and I had sent him to two or three different subcontractors and he seemed to last a day or two and then would either not show up or would get laid off and I wanted to check to see how he was doing for John.

Q. Okay.

A. See if there was no problems.

Q. By John, you mean John Binder?

A. John Binder, yeah.¹

Q. Okay. So, when you got there, let's see, you went into the building, is that correct?

A. Yes, sir.

Q. And who did you speak to first?

A. Mr. Grandy.

Q. And was that in—Where did that occur?

A. It was in the hallway.

Q. And what is it that was said?

A. He asked me who I was and I told him, I introduced myself, and asked him where Accoustical Arts guys were at and he said he wasn't sure. We walked down the hall and turned the corner and I saw Tim Paquette, who works for Accoustical Arts, in a big, rather large room.

Q. Okay. And, when you went in, who'd you speak to?

A. Tim.

Q. And who was there speaking to Tim besides yourself?

A. I believe Leon had found him by now.

Q. Okay.

A. I think he went in another door.

JUDGE LINSKY: What's Tim's last name again?

THE WITNESS: Paquette

JUDGE LINSKY: Do you know how to spell that?

THE WITNESS: P-a-q-u-e-t-t-e.

JUDGE LINSKY: Oh, yeah. Okay.

Q. MR. CANFIELD: And what was the conversation with Mr. Paquette?

A. I asked him where Mr. Cotton was and he explained to me that he got there in the morning and Ray was there—Mr. Cotton was there. He explained to Mr. Cotton what had to be done and Tim said, you know, he said his tools were out in the truck or whatever and Tim went into the next room or whatever and came back and Mr. Cotton left. I guess deciding that it was unsafe to work, I found out later.

Q. So your understanding with it at that point when you first spoke to Mr. Paquette he didn't know Mr. Cotton had left?

A. No. He knew he had left. He said he just turned around and he never—and he went outside to get his tools or whatever and—

Q. I see.

A. —and, he came back, there was—he was not found.

Q. Other than Mr. Grandy telling you or asking Mr. Grandy where the Accoustical employees worked, what other conversations, if any, did you have with Mr. Grandy?

A. He said just get your business done and, you know, please, leave, and I said, well, it's only going to take a second and I'll be gone.

Q. What was his tone of voice when he said that?

A. It was okay. It wasn't—it was—it was a little bit, maybe, agitated would probably be the best word.

Q. Where were you when he said that? What were you doing then?

A. In the hallway.

Q. And what were you doing at the time?

A. Trying to find the Accoustical Arts people.

Q. So that's when you first walked in?

A. Yeah, that was when I first walked in the door.

Q. How long were on the job, on the site, altogether that day?

A. Total from the time we drove in to the time we drove out, maybe ten minutes.

Q. Okay. Did—

JUDGE LINSKY: Now was—Cotton was going to be a 1045 member or—

THE WITNESS: No. He was a—he was a Carpenter member.

JUDGE LINSKY: Okay.

THE WITNESS: But I, like I say, Leon takes care of my members, I take care of Leon's members. It's a—it's a mutual thing. They all fall under the Carpenter umbrella and, because I had had first contact with Mr. Cotton, he knew me and so, when he would call for job placement or what-have-you, he would always ask for me because I had made the initial contact with him and he felt comfortable with me.

JUDGE LINSKY: Okay.

Q. By MR. CANFIELD: And, by Carpenters, you mean Local 706?

A. Right.

Q. And, when you use the term Carpenters, that's what we're referring to, is that correct?

A. Correct.

Q. Okay. Did you have an occasion—did you have an occasion to talk to Mr. Paquette later that night?

A. Yeah. He had called me at home and said, oh, by the way, when you were there, you could have signed up Kevin Culbert and I said who's he and he said, well, you know, we talked about—I talked to you about him a week or so ago and I just neglected to think about it when you were there, but can you come down tomorrow and sign him up, and I yeah, that's not a problem.²

Q. So who is Kevin Culbert?

A. He is the apprentice that I signed up on the following day, the 14th.

Q. A new employee?

A. A new employee, yes." Horner went on and testified about a conversation he had with Ray Cotton. Horner testified as follows:

Q. Okay. Was there a conversation with Mr. Cotton that night also?

A. Yes. After we left the job site, I dropped Leon off at the office and I went to look for Ray Cotton because I couldn't raise him on the phone. I think he was a little bit embarrassed. I tried calling him on his phone and, when he heard my voice, he hung up. And so I thought, well,

¹ John Binder is the owner of Accoustical Arts.

² Tim Paquette was the foreman for Accoustical Arts and a member of Local 1045.

I'll—I didn't know where he lived, but I knew the general vicinity, you know, the apartment complex, and I thought, well, I'll find his truck and then I'll find him and that's exactly what happened and I asked him why he left and he told me why he left and it was over a safety issue.

Q. Did he say what it was?

MR. MASUD: I would – Objection. Hearsay.

JUDGE LINSKY: Okay. The same ruling. It's not for the truth of the matter stated. Just their—

MR. CANFIELD: Yes, Your Honor.

JUDGE LINSKY:—statement as to what prompted possible further action on their part.

A. Yeah. He said that he was scared to—or he felt unsafe working on a scaffold that was kind of a make-shift deal with no handrails and no way to really tie yourself off above because the deck of the building was a little bit too high to get anything tied up there and he said he'd never encountered that before where he worked down in Ohio and he—he just didn't feel safe working off of that, and I said, okay, and that was it.

Robert Horner's testimony as to what occurred when he and Turnwald returned to the jobsite on October 14, 1999 was as follows:

Q. Now on October 14th did you go back to the Acoustical job site at Birch Run?

A. Yes.

Q. And who went with you?

A. Leon Turnwald again.

Q. Approximately what time did you go?

A. Before lunch again.

Q. Okay. And what is—what is the reason that you were there?

A. To sign—

Q. Why did you go?

A. To sign up Kevin Culbert.

Q. And what do you remember is the reason Mr. Turnwald was there?

A. To check out the safety—the safety concerns of one of his members.

Q. That would be Cotton?

A. Yes.

Q. So did you enter the building?

A. Yes.

Q. And who did you speak to initially?

A. Mr. Grandy again.

Q. Okay. And what did Mr. Grandy—Where did you see Mr. Grandy? Where did you meet with him?

A. In the hallway again. Just trying to find Acoustical Arts, I think I popped my head in one little room and stuck it out and Mr. Grandy was coming towards me and didn't have a look—didn't have a happy look on his face.

Q. And what was said? What did Mr. Grandy say?

A. What the fuck are you guys doing here again.

Q. Okay. Do you remember anything else he said?

A. Yeah. He asked me to leave and I told him I had to sign up a member.

Q. Okay.

A. Or not a member yet, but I had to sign up a guy.

Q. Okay. Other than a verbal communication, was there any kind of—anything else happen?

A. Yeah. He grabbed me—he grabbed me by like the arm or by the elbow area and said, you know, leave, and I said no, I've got to sign up a guy and I'll—and I'll, you know, just give me a little chance here and I'll—I'll get it done and I'll get out of here.

Q. Okay. Okay. Where did you go then? You were in the hallway and then where did you go?

A. I believe it was to the room that we were in the day before.

Q. Okay. And who went in?

A. Mr. Grandy was following close on my heels.

Q. Okay. And who else was with you?

A. Nobody. Leon was in that room.

Q. Okay. Did you and – did you and Mr. Turnwald have anything to say to each other at that point?

A. Yeah. I told him, Leon, I said, hey, this guy wants us out of here, and he said, well, when we get the guys signed up, we will—we will go as soon as I look at the safety thing.

Q. What did Grandy say to that?

A. You know, you guys get out of here, and he just kept hammering on get out of here, get out of here, and he was going to call Pat Wolgast and—

Q. What, if anything, do you remember about Mr. Grandy saying where you should take the person and sign him up, though?

A. Yeah. He said take him outside and sign him up and I said it's much too cold out there to—too cold and too windy, we're trying to fill out paperwork, they'll be blowing all over and, you know, we gotta—why not just do it right here and we'll get out of your hair.

Q. And you said—I think you testified Mr. Grandy kept on saying get out of here, get out of here. Did he say get out of here or get the fuck out of here?

A. Well, there's a lady present. I

Q. You've got to say what he said.

A. Yeah. He said get the fuck out of here.

Q. And what was his tone of voice?

A. It was very agitated. He was very angry.

Q. And then I think you said that he—you testified he said he would call Pat Wolgast, the owner.

A. Pat or whoever. Pat or Lynn, yeah.

Q. Okay. Was there any—do you remember any conversation in regards to his suggestion that he was going to call Wolgast?

A. Yeah. He said he was going to call Pat Wolgast and Leon reached in his pocket, grabbed a quarter, and said here, gesturing to take the quarter and go call him, and I said, Leon, he doesn't need that, I've got my cell phone, he can use my cell phone.

Q. Okay.

A. And then he refused.

Q. Now who is John Binder?

A. John Binder is the owner of Acoustical Arts.

Q. And was Mr. Binder—was Mr. Binder present that day at any point?

A. Yeah. He walked into the room at some point.

Q. And what'd he do when he walked in the room?

A. I went over and approached him. He laid down his tools on the—next to where Kevin was filling out his paperwork and—

Q. Okay. Tell us why Kevin was filling out the paperwork. What was that? Where was that?

A. It was in kind of—I don't know—if this were the room, he'd be seven or foot off the wall, nine foot off the wall, and there was a bundle of insulation with, I believe, a piece of ply—or drywall on it that—and we just kind of wiped off so that, when you were writing on the piece of paper it wouldn't get it all damaged.

Q. Okay. So—

A. And that's where John laid his tools was on that piece of drywall or whatever it was. Right next to where he was filling it out.

Q. So did you and Mr. Binder have a conversation?

A. Yeah. I asked John to step outside. I wanted to talk with him about the safety concerns that Mr. Cotton had had and I wanted to ask him how Ray did while he was there and, obviously, he wasn't there long enough to do anything.

Q. Okay. And, while you were talking, did anyone else join you?

A. At some point, Leon came out and said Kevin's got a question on this thing here, you know, what do I—what do you want me to have him put down, and I said, well, I'll be right in there and we turned and started to head back into the building and—

Q. What happened then?

A. Mr. Grandy was standing in the doorway and he said you guys stay out here and fill it out and, I don't know, I—I think Leon said, well, he's in there filling the stuff out and, just like Leon said,³ he went this way and Grandy kind of went that way and he just kind of shot through and then he turned and followed them and so the door was open and—

Q. I want to understand. Mr. Grandy's standing in the doorway. How much of the doorway does he occupy?

A. Half, maybe.

Q. Okay. And where's he standing? In the center? On the side? Where?

A. Well, I don't—I really don't remember.

Q. What do you remember about his body position? How was that?

A. He was physically trying to block the door from us coming back in.

Q. How was he doing that?

A. Just standing in the door telling us we couldn't re-enter.

Q. Now you said that Leon went one way and Mr. Grandy went another. You mean like Mr. Grandy went the same direction that Leon went?

A. Yeah. He tried to block. You know, he thought Leon was going to come in this way and then Leon just did a fast shuffle and shot in.

Q. Okay.

A. And then Mr. Grandy turned and followed him and then I didn't have to do anything. I just walked through the opening.

Q. Okay. And what happened? What did you see when you walked in? What happened then?

A. Kevin was still filling out the paperwork. I leaned over to explain something to him and Mr. Grandy said, well, I've got to clean up this area now and he just picked up the sheet of drywall or piece of plywood or whatever it was and threw everything.

Q. He threw the piece of drywall. How far?

A. He flipped it over. It physically, you know, it didn't—it stood up and then landed back over again. So it was a pretty good—

Q. Well, what happened to the—Mr. Binder's tools that were on there?

A. They—everything went flying.

Q. Everything?

A. Everything.

Q. And about the paperwork that Mr. Curwald had been filling out?

A. JUDGE LINSKY: Mr. who?

Q. By MR. CANFIELD: (continuing.) The new member.

A. Kevin?

Q. Yeah.

A. Kevin. I don't remember if he'd got that off just in time or if it fell in the floor and we had to pick it up.

Q. Where was—

A. I'm not sure.

Q. Where was Kevin when Mr. Grandy picked up the top of the drywall and threw it at Culbert?

A. Right within a foot or two of it.

Q. What happened after—what happened after the paperwork was completed?

A. We—I exited the building from that.

Q. How long were you on the job site in total?

A. Maybe ten—maybe fifteen—at the outset—minutes.

Respondent's principal witness was Brian Grandy. I observed Grandy on the stand briefly on March 31, 2000, when we had to declare a recess for reasons unrelated to the issues in this case, and again on June 13, 2000, when Grandy testified at length about the events of October 14, 1999.

Again, I found Leon Turnwald and Robert Horner to be very credible witnesses and insofar as Grandy's testimony varies from their testimony I credit Turnwald and Horner over Grandy.

Grandy testified that visitors to the jobsite such as Turnwald and Horner should first check in at the construction trailer and if no one is in the trailer they should seek out the person on site

³ No party requested the sequestration of witnesses pursuant to FRE Rule 615 and most of the witnesses for both sides were in the hearing room during the trial.

who is in charge and state their business. Further, only supervised visits would be allowed.

Grandy never told Turnwald and Horner on October 13 about these procedures however.

Grandy also testified that Turnwald and Horner were at the jobsite for 25 to 30 minutes on October 13 and for about 1 hour on October 14. I find that the time estimates of Turnwald and Horner to be more accurate.

According to Grandy, Turnwald asked him if he was happy working for Respondent. Turnwald credibly denied he asked Grandy that question.

In addition, Grandy testified that Turnwald and Horner did not have hardhats and were told they had to have them at the jobsite. Turnwald and Horner credibly testified that they had hardhats with them but that at no time did Grandy ever tell them they had to put on their hardhats.

Grandy concedes that on October 14 he immediately told Turnwald and Horner to sign up the new member outside or come back during the new member's lunch hour to sign him up.

The testimony at trial was that it was windy outside. The signing up of the new member would only take a few minutes and Grandy clearly interfered with the signing up of the new member.

Any disruption of work was caused by Grandy arguing with Turnwald and Horner and not by the conduct of Turnwald and Horner.

John Binder, the owner of Accoustical Arts, arrived at the jobsite and was told by Horner that they would be taking just 5 more minutes to sign up the new man and would be leaving.

Binder confirmed that new members are often signed up at the jobsite but are also occasionally signed up at the union hall. In addition, Binder testified that since 1985 when he went into business the Union has always been coming on jobs.

Grandy conceded that the employees of Accoustical Arts would follow Accoustical Arts rules on when to take a break or a luncheon recess and that foremen of Accoustical Arts not foremen of Respondent would direct the work of Accoustical Arts' employees on the jobsite.

Respondent tried to raise as a defense to its actions that the Union came to Respondent's jobsite to engage in "stripping," i.e., the union representatives would urge Respondent's employees to immediately leave the employ of Respondent and join the union and the union would immediately put them to work leaving Respondent without workers. However, while the Union may have engaged in "stripping" in the past, there is not a shred of credible evidence that they did so on October 13 or 14 or even intended to do so on these dates. I specifically discredit the testimony of Tom Murphy, an employee of Respondent, who claimed Turnwald asked him on October 13 if he was happy working for Respondent. I credit Turnwald's testimony that he never said that to Murphy.

Respondent was on the job from August 2, 1999 to November 12, 1999. In the \$800,000 bid contract there was a bonus of \$1000 a day for each day the job was completed early and a \$1500 penalty for every day the completion of the job was late. Suffice it to say the less than 30 minutes the Union was on the site on October 13 and 14 did not materially impact the completion of work on this site. Indeed, if Grandy had not been so

unreasonable, obnoxious, and confrontational the union representatives would have been at the jobsite even less than the 30 minutes they were there over 2 days.

C. Legal Analysis

The Board law that controls in this case is *CDK Contracting Co.*, 308 NLRB 1117 (1992), in which a unanimous three-member panel held that CDK Contracting violated Section 8(a)(1) of the Act by denying access to the jobsite to union officials seeking to communicate with employees of a subcontractor, who were represented by the union and where the subcontractor and union had an agreement containing a union access or visitation clause.

As the Board held in affirming Administrative Law Judge Timothy D. Nelson:

In its exceptions, the Respondent primarily contends that the principles set forth by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992), control this case. According to the Respondent, *Lechmere* dictates that the complaint allegations must be dismissed. For the reasons that follow, we disagree.

In *Lechmere*, the Court denied private property access to nonemployee union agents who sought access for the purpose of communicating an organizational message to employees. Here, substantially different issues and considerations are before us. At issue here is whether a general contractor may deny access to a jobsite to union officials who seek to communicate with employees of a subcontractor represented by the union where a visitation clause in the contract between the subcontractor and the union permits access. As the judge reasoned, the Respondent by soliciting other employers to perform work at the jobsite, 'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights' to the Union's contractual 'access' rights with those subcontractors. Thus, the Respondent here, unlike the Respondent in *Lechmere*, voluntarily undertook to have work performed by unionized subcontractors on the property. In these circumstances, the Respondent was not privileged to interfere with the contractual obligations of the subcontractors and the contractual rights of the unions that represented subcontractor employees. We conclude that the Respondent must permit those contractors to observe their contractual obligations. [308 NLRB at 1117.]

Accordingly, I find that Respondent, by Brian Grandy, violated Section 8(a)(1) of the Act by its behavior toward Union Representatives Leon Turnwald and Robert Horner.

Respondent can impose reasonable rules, e.g., a requirement that union representatives visiting a jobsite check in at the trailer or notify the person in charge of the jobsite of their presence at the jobsite provided, of course, that these rules on access are applied in a nondiscriminatory manner to all visitors.

The jobsite in this case was the interior of the building where the employees of Accoustical Arts were working and not the movie complex outdoor parking lot. I find based on the credited testimony of Turnwald and Horner that they did not "hin-

der the progress of the work” or “interfere with the progress of the work.”

REMEDY

The project at the Cinema Hollywood jobsite ended before the hearing in this case began and the remedy for Respondent’s violation should be a cease and desist order and the distribution by Respondent of an appropriate notice to the employees of Accoustical Arts who worked at the Cinema Hollywood jobsite.

CONCLUSIONS OF LAW

1. Wolgast Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 706 and Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act when it unlawfully refused and otherwise interfered with the Union’s right to enter the Cinema Hollywood jobsite.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Wolgast Corporation, Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Unlawfully refusing or otherwise interfering with the Union’s right to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of communication with employees represented by the Union.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

⁴ 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.

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

(a) On the Union’s request, permit it to enter the Cinema Hollywood jobsite or any other jobsite for the purposes of communicating with the employees of Accoustical Arts, Inc. which it currently represents provided, however, that Respondent is not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access.

(b) Within 14 days after service by the Region mail to the employees of Accoustical Arts who worked on the Cinema Hollywood jobsite at any time between August and November 1999 a copy of the notice marked “Appendix A.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 7 shall be mailed after being signed by the Respondent’s authorized representative.

(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.⁶

⁵ 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.”

⁶ The Respondent moved the admission of R. Exh. 2. The General Counsel had no objection. The record, however, does not reflect the admission of R. Exh. 2. R. Exh. 2 is hereby admitted and made a part of the official exhibits in this case.