

**Local 32B-32J, Service Employees International Union, AFL-CIO and Pratt Towers, Inc.** Case 29-CC-1285

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND WALSH

On May 16, 2000, Administrative Law Judge Jesse Kleiman issued the attached decision and on May 26, 2000, he issued an errata to his decision. The Charging Party (also referred to as Pratt), filed exceptions and a supporting brief, and the Respondent (also referred to as the Union), filed cross-exceptions with a brief in support and in answer to the exceptions. The Charging Party filed a letter brief in answer to the cross-exceptions.

The National Labor Relations 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,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

This case arises in the context of the Parties' unsuccessful negotiations for an initial contract and an ensuing strike. The complaint alleges that the Union's contract proposal contained a picket line clause prohibited by Section 8(e) of the Act, that the Union engaged in a strike in order to force or require Pratt to enter into an agreement containing that clause prohibited by Section 8(e), and that therefore the strike violated Section 8(b)(4)(ii) and (A). The judge found that the picket line clause was prohibited by Section 8(e). He nevertheless recommended dismissal of the Section 8(b)(4)(ii) and (A) allegation because he found the General Counsel failed to prove that an object of the strike was to force or require Pratt to enter into an agreement containing the picket-line clause.

For the reasons the judge gave, we agree that the picket-line clause was prohibited by Section 8(e). Unlike the judge, however, we find, based on established Board precedent, that an object of the strike was to force or require Pratt to enter into a contract containing the picket-line clause, and that therefore the Respondent violated Section 8(b)(4)(ii) and (A).

<sup>1</sup> The Charging Party 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.

I. FACTUAL BACKGROUND

On April 21, 1998,<sup>2</sup> the Board certified the Union as the exclusive collective-bargaining representative of full-time and regular part-time building service employees employed by Pratt. The Union and Pratt subsequently met on four occasions in an unsuccessful attempt to negotiate a collective-bargaining agreement.

At the first meeting on August 26, Union Representative Ira Sturm presented Pratt with alternative contract proposals. Pratt, with some reluctance, selected one of the proposals (called the Independent Agreement), as the starting point for negotiations. That proposal contained the following picket-line clause:

Article IV, Section 5

No employee covered by this agreement should be required by the Employer to pass picket lines established by any Local of the Service Employees International Union in an authorized strike.

During the four bargaining sessions, the parties agreed to various changes in the Independent Agreement, but disagreed as to other provisions. The parties did not discuss the picket-line clause during any of the bargaining sessions.

At the end of the final bargaining session on January 7, 1999, the Union stated that, if Pratt did not accept the proposal then on the bargaining table, the Union would strike. It is undisputed that the Union's proposed contract included the picket-line clause.

After Pratt refused to sign the proposed contract, the Union struck on February 22, 1999. Union Business Agent Daniel Gross testified that an object of the strike was to get Pratt to sign a collective-bargaining agreement. During the strike, the strikers informed the Union that they wanted to return to work. Gross replied that "he would prefer [the strikers] to stay out for a little longer because we would have a better chance of getting a contract signed."

II. THE JUDGE'S DECISION

As stated above, although the judge found that the picket line clause in the Independent Agreement was prohibited by Section 8(e), he nevertheless concluded that the General Counsel failed to prove a violation of Section 8(b)(4)(ii) and (A).<sup>3</sup> The judge reasoned as fol-

<sup>2</sup> All dates refer to 1998 unless otherwise specified.

<sup>3</sup> Sec. 8(b)(4)(ii) and (A) provides in relevant part as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

laws. The parties knew that the Independent Agreement contained the picket-line clause, but this clause was never a topic of discussion or controversy during the negotiations. Rather, the parties disagreed over other contract terms, and it was those disagreements that provoked the strike. Therefore, the General Counsel failed to prove that an object of the strike was to compel Pratt to agree to the picket-line clause. The judge cited *Longshoremen ILA Local 1418 (New Orleans Steamship Assn.)*, 235 NLRB 161, 169 (1978), and *ABC Outdoor Advertising, Inc.*, 169 NLRB 113, 116 (1968), as support for his decision.

### III. ANALYSIS AND CONCLUSIONS

In its exceptions, the Charging Party argues, inter alia, that the cases the judge cited are not apposite and that Board precedent actually supports its position that the Union violated Section 8(b)(4)(ii) and (A). As discussed below, we agree with the Charging Party.

Two decisions upon which the judge relied, *New Orleans Steamship Ass.*, and *ABC Outdoor Advertising* are clearly distinguishable from this case. In *New Orleans Steamship Ass.*, the Board affirmed the decision of the administrative law judge that a violation of Section 8(b)(4)(ii) and (A) requires evidence that an employer was coerced into entering into an agreement prohibited by Section 8(e). The Board concluded in agreement with the judge that the union had not violated Section 8(b)(4)(ii) and (A), even though the union and an employer association had entered into an agreement prohibited by Section 8(e), because the parties had entered into the agreement voluntarily. 235 NLRB at 169. Therefore, the required element of coercion was absent. Here, by contrast, it is undisputed that the Union engaged in a strike to obtain an agreement. Further, it is well established that a strike constitutes “coercion” within the meaning of the statute. *Ets-Hokin Corp.*, 154 NLRB 839, 842 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969). At issue in *ABC Outdoor Advertising*, was whether a respondent discharged an employee in violation of Section 8(a)(3). The Board affirmed an administrative law judge’s finding of the violation and the judge’s rejection of the respondent’s argument that the discharge was lawful because the employee participated in an illegal strike to compel the respondent to enter into an agreement prohibited by Section 8(e). As found by the judge, although the union had at one point in bargaining proposed a contract provision prohibited by Section 8(e), the union “abandoned [that provision] entirely” and replaced it with a lawful provi-

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(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

sion before the strike began. *ABC Outdoor Advertising*, 169 NLRB at 116. In this case, however, the Union never changed its position on the unlawful picket line clause.

There is no precedential support, then, for the judge’s finding that the Union’s strike did not have as an object forcing or requiring Pratt to enter into an agreement proscribed by Section 8(e). *Teamsters Local 559 (Anopolsky & Son.)*, 145 NLRB 722 (1963), meanwhile, strongly supports a contrary result.

In *Anopolsky*, at the parties’ second bargaining session, the employer questioned whether Section 8(e) prohibited a picket line clause in the union’s contract proposal, and the union promised to check with its attorney about the clause’s legality. The parties at no time thereafter discussed the clause. Eventually, the union struck to compel the employer to sign the union’s contract proposal, which included the picket line clause. Like the judge in this case, the *Anopolsky* judge found that the picket line clause was prohibited by Section 8(e), but he nevertheless recommended dismissal of the Section 8(b)(4)(ii) and (A) allegation, using essentially the same reasoning as the judge here. Pointing to disagreements during bargaining about the union’s economic demands, the *Anopolsky* judge found that the union’s insistence that the employer sign the contract to avoid a strike referred only to those demands. Because the parties had not referred to the illegal picket line clause after the employer raised questions about it and the union promised to check with its attorney, the judge held that the General Counsel had failed to show that an object of the union’s strike was to compel inclusion of the illegal clause in a contract with the employer. *Anopolsky*, 145 NLRB at 729–730.

While the *Anopolsky* Board agreed with the judge that the picket line clause was unlawful under Section 8(e), it rejected the judge’s reasoning on the Section 8(b)(4)(ii) and (A) issue and concluded that the strike violated the Act. Emphasizing that the union insisted the employer sign the contract and began the strike when the employer refused to do so, the Board concluded that the strike was intended to force the employer to sign the specific contract the union had proposed, which, at all relevant times, included the clause prohibited by Section 8(e). *Anopolsky*, 145 NLRB at 723–724.

The facts here are not materially distinguishable.<sup>4</sup> The Union proposed an agreement containing a picket line

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<sup>4</sup> We are not persuaded by the judge’s attempt in fn. 20 of his decision to distinguish *Musicians Local 16 (Bow & Arrow Manor)*, 206 NLRB 581, 590 (1973), enfd. 512 F.2d 991 (D.C. Cir. 1975). We find that *Bow & Arrow* supports the finding of a Sec. 8(b)(4)(ii) and (A) violation in the instant case. The union in *Bow and Arrow* engaged in a strike in an effort to force the employer to sign an agreement that con-

clause prohibited by Section 8(e). The Union insisted that Pratt sign the contract or else the Union would strike. When Pratt refused to sign the contract, the Union began a strike. The strike was to compel Pratt to sign a contract, which, at all relevant times, included the clause prohibited by Section 8(e). Accordingly, we find that the Union's strike, which began on February 22, 1999, had as an object forcing or requiring Pratt to enter into an agreement proscribed by Section 8(e), and that such conduct violated Section 8(b)(4)(ii)(A) of the Act.<sup>5</sup>

#### AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's conclusion of law 3.

"3. The picket-line clause, article IV, section 5 of the Independent Agreement is violative of Section 8(e) of the Act."

2. Substitute the following for the judge's conclusion of law 4:

"4. The Respondent did not violate Section 8(e) of the Act because the parties did not enter into an agreement."

3. Add the following for the judge's conclusion of law 5.

"5. The Respondent, Local 32B-32J, violated Section 8(b)(4)(ii) and (A) of the Act by engaging in a strike that had as an object forcing or requiring Pratt to enter into an agreement prohibited by Section 8(e)."

#### ORDER

The National Labor Relations Board orders that the Respondent, Local 32B-32J, Service Employees International Union, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Engaging in a strike or in any other way threatening, coercing, or restraining Pratt Towers, Inc., where an object thereof is to force or require Pratt Towers, Inc., to enter into any agreement prohibited by Section 8(e) of the Act.

tained a picket line clause prohibited by Sec. 8(e). As here, the parties in *Bow & Arrow* did not discuss the picket line clause during bargaining. The Board, with court approval, concluded that the union violated Sec. 8(b)(4)(ii) and (A).

<sup>5</sup> Our decision is supported by other cases as well. See, e.g., *Teamsters Local 294 (Rexford Sand & Gravel Co.)*, 195 NLRB 378, 382 (1972) (union violated Sec. 8(b)(4)(ii) and (A) by threatening to picket employer with an object of forcing employer to enter into union's form contract, which contained picket-line clause prohibited by Sec. 8(e); parties had not discussed picket-line clause during negotiations); *Teamsters Local 445 (Edward L. Nezelek)*, 194 NLRB 579, 585 (1971) (union violated Sec. 8(b)(4)(ii) and (A) by picketing employer with an object of forcing employer to enter into agreement containing picket-line clause prohibited by 8(e); parties had not discussed picket-line clause during negotiations), *enfd.* 473 F.2d 249 (2d Cir. 1973).

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

(a) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked "Appendix."<sup>6</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 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 mail sufficient copies of the notice to the Regional Director for posting by Pratt Towers, Inc., if willing, at all places where notices to its 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 the Respondent has taken to comply.

#### 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.

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 engage in a strike or in any other way threaten, coerce, or restrain Pratt Towers, Inc., where an object thereof is to force or require Pratt Towers, Inc., to enter into any agreement prohibited by Section 8(e) the National Labor Relations Act.

LOCAL 32B-32J, SERVICE EMPLOYEES  
INTERNATIONAL UNION, AFL-CIO

<sup>6</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."

*Amy S. Krieger, Esq.*, for the General Counsel.  
*Ira A. Sturm, Esq. (Raab, Sturm & Goldman, LLP)*, for the Respondent Union.  
*Kevin J. McGill, Esq. and Jennifer M. Crook, Esq. (Clifton Budd & De Maria, LLP)*, for the Employer.

## DECISION

### STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed by Pratt Towers, Inc. (the Employer or Pratt Towers), on April 12, 1999, against Local 32B-32J, Service Employees International Union, AFL-CIO (the Respondent Union or Local 32B-32J), a complaint and notice of hearing was issued on May 17, 1999, alleging that the Respondent Union had violated Section 8(b)(4)(ii) and (A) of the National Labor Relations Act (the Act). By answer timely filed, the Respondent Union denied the material allegations in the complaint.

Inasmuch as consolidated Cases 29-CA-22657, 29-CA-22660, and 29-CA-22666 (the CA cases), and Case 29-CC-1285 (the instant or CC case), involved some of the same witnesses and parties, by Order dated May 17, 1999, the CA cases and the CC case were directed to be heard consecutively, with the CC case to follow the trial of the CA cases. A trial was held before me in Brooklyn, New York, in the CA cases from July 15 through August 13, 1999, with the CC case then being heard by me on August 16, 1999, after the conclusion of the CA cases.<sup>1</sup>

Subsequent to the close of the CC case, the General Counsel, the Employer, and Local 32B-32J filed briefs addressing the issues in Case 29-CC-1285.<sup>2</sup>

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYER

The Employer, a New York corporation, is engaged in the operation of a 23-story, 326-unit residential cooperative apart-

<sup>1</sup> At the hearing, counsel for the General Counsel in the CC case moved to incorporate by reference, the record evidence in the CA cases into the CC case record, and requested that one decision issue covering both the CA cases and the CC case. There being no opposition I granted the motion and request. Subsequent to the close of both the CA cases and the CC case, new complaints issued in Cases 29-CA-20312, and 29-CA-23137 involving Pratt Towers and Local 32B-32J. At the request of the parties, these cases were assigned to me for trial. Since Case 29-CC-1285 is a statutory priority case, upon notice to all parties and without any objection being raised I have decided instead to issue a separate decision in Case 29-CC-1285.

<sup>2</sup> Subsequent to the close of the trial in this matter and submission of briefs by all the parties, the Respondent Union filed a formal "Motion to Dismiss Complaint" and a "Memorandum of Law" in this case alleging that the "General Counsel has failed to establish a prima facie violation of the Act under established Board law, even if all facts were read in a light most favorable to the General Counsel's theory." Both the General Counsel and the Employer filed replies in opposition to that motion. By order dated March 24, 2000, I reserved decision on this motion the merits of which will be considered in this decision.

ment building located at 333 Lafayette Avenue, Brooklyn, New York, its principal office and place of business. During the past year, the Employer, in the course and conduct of its business operations derived gross revenue in excess of \$500,000, and purchased and received at its Brooklyn facility goods, supplies, and materials valued in excess of \$5000 directly from points located outside the State of New York. The complaint alleges, Local 32B-32J admits, and I find that the Employer is now, and has been at all times material herein, an employer and a person engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties admit, and I find that Local 32B-32J, at all times material, has been a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that by engaging in a strike the object of which was to force or require the Employer to enter into an agreement with Local 32B-32J containing a picket line clause prohibited by Section 8(e) of the Act, the Respondent violated Section 8(b)(4)(ii) and (A) of the Act.

##### A. The Evidence

##### 1. Background

Prior to April 21, 1998, the Employer's building service employees were represented by Local 2, New York State Independent Union of Building Service Employees and Factory Workers (Local 2). Pursuant to a stipulated election agreement an election by secret ballot was held on April 7, 1998, with both Local 2 and Local 32B-32J on the ballot. A majority of the ballots being cast in favor of Local 32B-32J, on April 21, 1998, the Respondent Union was certified as the exclusive collective-bargaining representative of all full-time and regular part-time building service employees employed by Pratt Towers, Inc., at 333 Lafayette Avenue, Brooklyn, New York, excluding guards and supervisors as defined in the Act.

Pratt Towers and Local 32B-32J met on four separate occasions: August 26, September 24, October 27, 1998, and on January 7, 1999, to negotiate a collective-bargaining agreement. The Employer's principal spokesman was Kevin McGill, Esq.,<sup>3</sup> and the Respondent Union's chief negotiator and sole participant at these bargaining sessions was Ira Sturm, Esq.<sup>4</sup>

<sup>3</sup> At all the bargaining sessions McGill was accompanied by Eunice Johnson the Employer's on-site property manager, and a representative from Pratt Towers' board of directors. Valerie Brooks, president of the board attended the August 26, 1998 meeting while the Board's vice president, John Porter, attended the other three meetings. McGill is an experienced labor attorney with approximately 20 years' experience negotiating contracts, including a predecessor agreement to the 1997 Independent Agreement with Local 32B-32J.

<sup>4</sup> Sturm is also an experienced labor negotiator with 20 years' experience representing the Respondent Union in negotiations with various Employer Associations and employers negotiating apartment house contracts every 3 years since 1980, and about 14 or 15 Realty Advisory Board (RAB) contracts every 2 years.

None of the unit employees attended or played any role in these negotiations.

## 2. The August 26, 1998 meeting

The first negotiation meeting between the parties was held on August 26, 1998. Present were Kevin McGill, Esq., Eunice Johnson, and Co-op President Valerie Brooks for Pratt Towers, and Ira Sturm, Esq., for Local 32B-32J. This being in the nature of an introductory session, the parties set forth some of their positions in generalities but did not engage in any substantive bargaining or make any formal proposals. McGill briefly described Pratt Towers as a residential apartment building of low and middle income rentals subject to New York City's Mitchell Lama program. Sturm now explained to the Employer's representatives the Real Estate Advisory Board's contract with Local 32B-32J, (the RAB contract), as well as the Respondent Union's form Independent Apartment House Agreement of 1997 (the Independent Agreement). Sturm further explained that the Real Estate Advisory Board is a multi-employer association which negotiates a master pattern agreement containing wages and terms and conditions of employment on behalf of its members and does not permit any change in the terms of the agreement. Sturm then explained that the Independent Agreement drafted by Local 32B-32J, was similar to the RAB contract except in certain areas like the expiration language in the "Evergreen" clause and the "Reduction-in-Force" provision. There was some discussion about the disparity between the wage rates in the RAB contract and the employees' present wage rate.

Sturm testified that as an "offer in lieu of negotiation" Local 32B-32J gave Pratt Towers the option of entering into either the RAB contract, or the Independent Agreement. Although Sturm testified that he gave the Employer a third option, "to bargain an agreement from scratch" as was his standard procedure when negotiating contracts, both McGill and Johnson testified that Sturm never gave them such an option.<sup>5</sup> McGill testified

<sup>5</sup> McGill also testified that Pratt Towers, in fact, was never given the option to bargain from scratch at any time during the entire negotiation period. While McGill took no notes of this first meeting, Sturm did. The record shows that no where in Sturm's notes which he made contemporaneously during the negotiations, including the August meeting, is there any reference to the phrase "bargain from scratch" as an option given to the Employer during the negotiations between the parties. Moreover, while the Union's business agent Daniel Gross, testified that he exhibited copies of both the RAB and the Independent Agreement to Pratt Tower's employees to show them what 32B-32J was offering the Employer for them, he never testified that he told them that the Union had also offered Pratt Towers the option to bargain from scratch, or any words to this effect. Additionally, noting McGill's constant protest, throughout the negotiations, about what he referred to as "outrageous" clauses in the Independent Agreement (i.e., the Evergreen Clause, Contract Arbitrator Clause, Reduction-in-Force Clause, medical insurance fund costs, etc.), it would seem improbable that Pratt Towers would not consider to negotiate from scratch rather than the Independent Agreement, which McGill also felt created a financial hardship for Pratt Towers, if such a choice had been offered by Sturm.

However, it should be noted that while I may disbelieve Sturm regarding this part of his testimony, I do not discredit all of his testimony, given in the CC or the CA cases. A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not

that inasmuch as Pratt Towers could not afford the RAB contract, the Employer's only realistic option was to choose the Independent Agreement as the starting point for negotiations.

McGill protested that the entire Independent Agreement created a financial hardship for Pratt Towers. Sturm proposed that Pratt Towers could have the option to negotiate wages or take the wage increase in the Independent Agreement plus a \$10 catchup until wages reached the industry rate. Medical costs were an Employer concern since 32B-32J's health plan costs were 60 to 70 percent higher than the cost of its employees previous coverage under Local 2's plan. The parties were also concerned that the employees had no medical coverage at present, and this was also a topic of discussion. McGill suggested using the American Arbitration Association (AAA), since the Independent Agreement specifically provides for arbitration via the Office of the Contract Arbitrator (OCA), and the Respondent Union, and the RAB have exclusive authority jointly to select the arbitrators thus effectively negating Pratt Towers input in the choice of an arbitrator under its own collective-bargaining contract. The Respondent Union rejected McGill's proposal. Additionally, both McGill and Sturm indicated their unhappiness with some of the arbitrators listed in both the form RAB and Independent Agreement.

The Employer also expressed "great concern" over the reduction-in-force provision of the Independent Agreement (RIF). Under this clause the Employer was required to obtain written permission from the Respondent Union's president before it could reduce its staff size. Pratt Towers wanted the flexibility to determine its staff needs and suggested that if staff were reduced from eight to six employees, Pratt Towers might be able to afford the contract. The parties adjourned with the agreement to "consider the situation."

## 3. The September 24, 1998 meeting

The second negotiation session took place on September 24, 1998. Attending this meeting were Kevin McGill, Eunice Johnson, and Co-op Vice President John Porter for the Employer and Ira Sturm representing Local 32B-32J. The parties discussed the economics of the contract. McGill again expressed great concern about the cost of Local 32B-32J's medical plan as provided for in the Independent Agreement and proposed to offset this by "attriting" one position and no wage increase for the term of the agreement or payment into the pension and other union funds. Local 32B-32J rejected the Employer's proposal.

Sturm proposed that the wage increase go into effect on April 21, 1999 (the annual date of the Independent Agreement), with a \$10 catchup and that the Employer start payments into

all of what a witness says. *Americare Pine Lodge Nursing*, 325 NLRB 98 (1997); *Brinkman Southeast*, 261 NLRB 204 (1982); *Giovanni's*, 259 NLRB 233 (1981); *Maxwell's Plum*, 256 NLRB 211 (1981). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950):

It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all. Moreover, the above would also be applicable to the testimony of McGill and Johnson as will be discussed in other parts of this decision.

the Union funds in November 1998. The Employer rejected this as too expensive. Moreover, the parties discussed the reduction-in-force issue with the Employer wanting to fix its own staffing needs. The Respondent Union took the position that the unit, remain at eight not six employees. Sturm testified that the Employer made no counterproposal regarding wages at this meeting. The parties also discussed the arbitration clause. The Employer proposed to select two arbitrators, Bernard Young and Howard Edelman, from among the list of arbitrators in the Independent Agreement. The Respondent Union did not respond to this proposal at that time.

4. Pratt Towers' October 8, 1998 letter

By letter dated October 8, 1998, from McGill to Sturm, Pratt Towers set forth its proposal for a collective-bargaining agreement indicating that the parties should "work from the standard 1997 apartment house agreement." This letter continues:

There are numerous provisions in this agreement we would like to negotiate out, but we recognize that if we were to take a hard and fast position with so many of these items that we will not conclude an agreement any time in 1998. Having said that, we are unable to agree on the following provisions of the apartment house agreement:

1. The wage scale.
2. The health plan contributions.
3. The annuity plan contributions.
4. The pension plan contributions.
5. The Office of the Contract Arbitrator.
6. The no reduction-in-force clause.
7. The "roll-over" or "evergreen" clause which appears to be camouflaged within in the sale and transfer clause.
8. The union security clause may not be legal. We have no objection to a legally sufficient Union security clause.
9. The inclusion of security guards in the unit description.

*Wages*—We are prepared to offer the following: an increase in base weekly wages of \$20.00 for each classification and for each of the three years of the contract. This is basically the \$15.00 increase recently negotiated in 1997 plus a \$5.00 per week "catch-up."

*Health and Welfare Benefits*—We are prepared to offer an annual contribution of \$3,500 which is the amount we had been contributing to the Local 2 Welfare Fund. This annual contribution would be for each of the three years of the agreement.

*Annuity Fund*—We have no proposal for any contributions to the annuity fund.

*Pension Fund*—We offer an annual contribution of \$338.04 (@ 28.17 per month).

*Contract Arbitrator*—We propose Howard Edelman and Elliot Shriftman to serve on a rotating basis.

*Reduction-in-Force*—Our proposal is for the deletion of all language restricting the Employer's right to reduce staff, if necessary.

*Term of the Contract*—The contract term we propose is three years from the execution date of the contract. We do not agree that the contract will remain in full force and effect notwithstanding the expiration date, as appears to be the case in the evergreen clause contained in your sale and transfer provisions.

*Security Guards*—delete the above-described proposal is an attempt to harmonize our financial situation with the expectations of our employees that they will be covered by a relatively standard industry agreement. *The financial burdens contained in the 1997 apartment house agreement are not something that we can accept in toto.* Nonetheless, we have attempted to give our employees the numerous protections and prerogatives [sic] contained in the Independent Agreement. Naturally, we are willing to discuss this with the Union and to answer any of your questions or hopefully respond to any of your concerns.

Therefore, by this October 8 letter, Pratt Towers informed the Respondent Union that while it did not like all of the provisions in the Independent Agreement, it was amenable to accepting all of the terms of the Independent Agreement except for those major disputed items listed above in McGill's October 8 letter. Moreover, the record demonstrates and the Employer admitted that what McGill set forth in his October 8, 1998 letter to the Respondent Union constituted the Employer's offer to Local 32B-32J. As McGill and Johnson both testified, Pratt Towers' proposal to the Respondent Union was the Independent Agreement with the exception of the nine enumerated items listed above.<sup>6</sup> However, no mention is made therein concerning the Employers' opposition to the picketing clause (art. IV, sec. 5), in the Independent Agreement.

5. The October 27, 1998 meeting

The third negotiation session between the Parties with the same respective representatives occurred on October 27, 1998. McGill again raised the issue of the expense of the Respondent Union's medical plan as a major problem for Pratt Towers. McGill proposed that the Employer be permitted to participate in the "Suburban Plan," a medical plan provided for in Local 32B-32J contracts with Long Island and New Jersey employers. The "Suburban Plan" costs less than the medical plan in the Independent Agreement. Local 32B-32J rejected this proposal because it would raise too many problems.

Pursuant to McGill's October 8, 1998 letter to Sturm, the Respondent Union agreed to use the standard Independent Agreement, with certain changes discussed by the Parties. Local 32B-32J proposed a wage of \$15 and a \$10 catchup effective November 1, 1998, with standard increases "up to scale;" an effective date of November 1, 1998, for payment to "funds and everything else;" and exclusion of security guards from the unit. The Parties agreed that Howard Edelman would

<sup>6</sup> While McGill admitted on numerous occasions that Pratt Towers proposed and agreed to all provisions of the Independent Agreement except for the nine enumerated items in the October 8 letter, McGill contradicted this testimony by also testifying that Pratt Towers did not agree to any of the specific items in the Independent Agreement that were not discussed. I do not credit McGill's contradictory testimony concerning this. See fn. 5 supra.

serve as contract arbitrator and discussed how to pay for his fees. The Employer and the Respondent Union also discussed the “Reduction-in-Force” and the “Evergreen” clause issues. Local 32B-32J refused to agree to the Employer’s proposal to “change” or to delete these clauses from the contract. McGill testified that Sturm stated at the October meeting that there were only two variables that would be permitted from the Independent Agreement—retroactivity and wage increases.<sup>7</sup>

#### 6. The January 7, 1999 meeting

The parties same representatives met for a fourth and last negotiation session on January 7, 1999. By this time Pratt Towers and Local 32B-32J had agreed that the security guards would be excluded from the contract’s coverage with the parties continuing to negotiate from the Independent Agreement. Sturm presented a wage proposal of a \$15 increase to start on November 1, 1998, with contract increases and a \$10 catchup beginning on April 21, 1999. Local 32B-32J proposed that the Employer contribute to the Union’s funds effective January 1, 1999, and agreed to provide a separate rider for the building superintendent with a different expiration date from the Independent Agreement. Moreover, the Respondent Union rejected Pratt Towers proposals to eliminate the Evergreen Clause, to enter into a 3-year contract, change or eliminate the reduction-in-force language, change the arbitrator proposal, and join the Union’s “Suburban” medical plan. McGill stated that the Employer could, reluctantly, live with the OCA language in the contract.

Thus, by the end of this meeting Sturm had proposed the Independent Agreement language with modifications. McGill asked Sturm, what, if anything, would occur if Pratt Towers did not accept the proposed agreement, and Sturm replied that the Respondent Union would have no alternative but to strike the building. It is conceded by both parties to the negotiations that certain clauses of the Independent Agreement were never discussed during the negotiations including article IV, section 5 (“the picket-line clause”).

According to the testimony of Pratt Towers’ witnesses, Sturm now told McGill that he wanted the Employer to sign the contract that evening. McGill advised Sturm that he was obliged to take back the Respondent Union’s last offer to Pratt Towers’ board of directors for its consideration. This was the first that Sturm had been made aware that Pratt Towers’ representatives at the negotiations had no authority to agree to a contract. McGill testified that he believed Sturm responded to this comment, “Look, its on the table tonight and there’s no guaranty that if you accept it after tonight that it will be there any more.” McGill testified:

This was towards the end of the meeting and [Sturm] said, Look, the only thing that we can do for you is on the wage increases and the implementation dates, and if you’re not pre-

<sup>7</sup> While Sturm testified that McGill actually made this statement, both Sturm’s notes of this bargaining session states, “U only variables from U perspective is amount of increase and retroactivity,” and McGill’s notes reflect “Ira says, there are basically two variable—retroactivity—wage increase, amount of it” and that these were the “only variables.”

pared to accept that as is, we will have no other choice but to strike the building.<sup>8</sup>

McGill also testified that Sturm had reiterated that Pratt Towers had to take the Independent Agreement “as is” that evening more than once. However McGill also admitted that he knew that “as is” meant the Independent Agreement with changes that the parties had discussed. McGill asked Sturm if he could give Pratt Towers some notice before a strike would occur, but Sturm replied no, why should he do that? McGill told Sturm that he would try, and call him the following day and the meeting then ended.

Johnson testified that Sturm had said, “I would like to have [Pratt Towers] sign this agreement tonight.” She also testified that she recalled Sturm saying that Pratt Towers had to sign the agreement “as is.” However, Johnson admitted that at the conclusion of the January 7 negotiation session the Respondent Union’s proposal included the Independent Agreement with changes concerning wages, medical plan, reduction-in-force, and effective dates of the agreement.

Sturm’s testimony directly contradicts that of Pratt Towers’ witnesses. Sturm testified that he didn’t think he said that Pratt Towers had to sign an agreement that night, but instead had said, “[T]his is a deal that’s on the table tonight, you can either accept it or reject it, but if you turn it down I’m not guaranteeing that this deal will be on the table tomorrow.” He also may have said, “Well, the offer may not be available after tonight . . . and if you make another offer there’s no guarantee the Union will accept it.” Additionally, Sturm denied that he had told McGill at the January 7 negotiation meeting that Pratt Towers had to sign the contract “as is.”<sup>9</sup>

In sum, the Respondent Union’s last offer was the Independent Agreement with the following changes: the effective date of the wage increases be moved to April 21, 1999, a wage catchup period, a separate superintendent rider allowing the Employer more flexibility, a different expiration date, and an effective date of January 1, 1999, for contributions to the pension and welfare funds. However, the parties remained adamant as to their other positions, the Employer regarding the items contained in its October 8, 1998 letter, and the Respondent Union as to those unresolved issues in the Independent Agreement vis-à-vis this letter. The parties failed to reach a final agreement, and both Sturm and McGill testified that after the January 7 bargaining session, they believed that the parties had reached an impasse in negotiations.<sup>10</sup>

The record evidence clearly shows that the Employer on October 8, 1998, proposed to the Respondent Union the Independent

<sup>8</sup> In his notes of this bargaining session McGill reflected, “Ira says we have to take the Ind K as is or he will strike the building. Ask for notice, Ira says he will not give notice.”

<sup>9</sup> Interestingly, in his notes in reference to the Respondent Union’s response to Pratt Towers’ proposal to reduce the maintenance unit from eight to six, Sturm noted “Unit stays as is.”

<sup>10</sup> The evidence shows that on January 7, 1999, the parties had reached impasse on wages, medical, and other benefits funds, contract arbitrator issue, reduction-in-force language, the Evergreen clause, and the union-security clause whose legality McGill questioned, while other contract clauses, such as the *picket-line clause*, were never discussed or challenged.

ent Agreement, with nine modifications thereof, and thus agreed to all terms in the Independent Agreement except for the nine items listed in its October 8 letter. It is undisputed that the Employer nor the Respondent Union raised the subject of picket lines and the picket-line clause (art. IV, sec. 5), in the Independent Agreement nor was it discussed by the parties at any time during the entire course of the contract negotiations. McGill admitted that had the parties reached agreement on the nine items listed in his October 8 letter to Sturm, the agreement would have included the picketing clause. Moreover, Johnson testified that other than wages, benefits, the arbitrator, and the length of the contract, Pratt Towers was aware of no other issues that might have caused Local 32B-32J to go out on strike.

#### 7. The strike

On February 22, 1999, Pratt Towers' employees went out on strike at the insistence of Local 32B-32J. Sturm testified that it was not an object of the strike to obtain the picketing clause in the collective-bargaining agreement between the parties. Sturm stated that the purpose of the strike was to achieve agreement on issues that were in dispute, such as the effective date of the contract, wage rates, and the date of implementation of any wage increases, whether the Employer would contribute to the Union's funds and when, the length of the contract, whether the contract would include the Evergreen clause, Reduction-in-force language, whether the length of the contract would coincide with the Independent Agreement or be for 3 years as the Employer proposed, and whether the arbitrator would be Howard Edelman or OCA.<sup>11</sup>

Moreover, Union Business Agent Daniel Gross testified that he had informed the unit employees that while the Independent Agreement would be the basis for any settlement, Local 32B-32J had sanctioned a strike because the parties had reached impasse. Gross admitted that an object of the strike was to get Pratt Towers to sign a collective-bargaining contract. In fact when the striking employees indicated that they would like to return to work sometime after the commencement of the strike, Gross testified that he told them, "Yes, I would've liked you to have stayed out longer because it probably would've helped us get the contract signed, but it's your decision, and I, you know, you have to make your own decision on it."<sup>12</sup>

#### 8. Credibility

As to the credibility of the witnesses in this case, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976).

<sup>11</sup> McGill agreed that it was "essentially correct" that after October 8, 1998, there was no dispute raised as to any of the items or any of the terms contained in the 1997 Independent Apartment House Agreement except for the nine items that were listed in the October 8 letter.

<sup>12</sup> Striking employee Theogy Brailsford testified that upon advising Gross that he wanted to return to work from the strike, Gross said, "[H]e would prefer us to stay out for a little longer because we would have a better chance of getting a contract signed."

Both the General Counsel and Pratt Towers assert that the Respondent Union's main witness, Ira Sturm, was not a reliable witness because of his inconsistent, evasive and shifting testimony, and should be discredited. The Respondent Union maintains, in effect, the same about the General Counsel's key witnesses, Kevin McGill and Eunice Johnson. Interestingly enough, as the record shows, both the General Counsel and Pratt Towers on the one hand and the Respondent Union on the other, have some merit to their allegations. Therefore as the occasion arises, I will discuss the issue of witness credibility as it effects the circumstances presented in the light of any additional evidence such as documentary or other reliable evidence.

#### B. Analysis and Conclusions

The complaint alleges that the Respondent Union violated Section 8(b)(4)(ii) and (A), herein 8(b)(4)(A), of the Act, by engaging in a strike the object of which was to force or require Pratt Towers, Inc., to enter into a collective-bargaining agreement with it containing a picket line clause prohibited by Section 8(e) of the Act.

A strike by a union to compel an employer to agree to a provision in a collective-bargaining agreement that would violate Section 8(e) of the Act constitutes a violation of Section 8(b)(4)(A) of the Act.<sup>13</sup> Section 8(e) of the Act provides, in pertinent part, that

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered into . . . containing such an agreement shall be to such extent unenforceable and void . . .

Section 8(b)(4)(A) makes it an unfair labor practice for a labor organization to induce or encourage employees to engage in a strike or to threaten, coerce or restrain any person where an object thereof is:

forcing or requiring any employer or self-employed person to join any labor organization or to enter into any agreement which is prohibited by section 8(e).

It is undisputed that the Independent Agreement which Local 32B-32J asked Pratt Towers to sign at the January 7, 1999 negotiations session contained the following clause, article IV, section 5, herein referred to as the "picket line clause." This clause reads:

No employee covered by this agreement should be required by the Employer to pass picket lines established by any Local of the Service Employees International Union in an authorized strike.

Moreover, it is further undisputed that while Sturm and McGill were familiar with the contents of the Independent Agreement, neither the subject of the picket-line clause, nor of any picket line clause at all, was discussed, objected to, or referred to at

<sup>13</sup> *Operating Engineers Local 520 (Massman Construction)*, 327 NLRB 1 (1999); *Iron Workers 751 (Hoffman Construction)*, 292 NLRB 562 (1989), enf. 913 F.2d 1470 (9th Cir. 1990).

any time during the negotiations or by correspondence between the parties.

The Board has held picket-line clauses similar to that in article IV, section 5 of the Independent Agreement, in violation of Section 8(e) of the Act. As Administrative Law Judge Gordon J. Myatt stated in *Teamsters Local 467 (Mike Sullivan & Assn.)*, 265 NLRB 1679, 1681 (1982), and affirmed by the Board:

The vice of the language of the clause . . . is that it protects refusals to cross any picket line, whether primary or secondary, and, as such, is broad enough to apply to unlawful secondary picketing. It is irrelevant whether the Union only intended for the clause to apply to lawful primary picketing or whether . . . there had been no determination regarding the type of picketing engaged in at the jobsite. What is relevant is whether the “picket line” clause on its face is limited to lawful primary activity or whether its terms are so broad that it applies to unlawful secondary picketing as well. In the latter instance, the clause perforce violates the strictures of Section 8(e).<sup>14</sup>

I find that the language of the clause in the instant case is overly broad in that it makes no distinction between lawful and unlawful picketing. It grants an employee the right to refuse to cross a picket line without any limitation as to whether the picketing is primary or secondary. The clause also precludes the employer from discharging or disciplining an employee for exercising this right of refusal. It follows, therefore, that the clause can be applied to unlawful secondary picketing without fear of any sanctions being imposed by the employer. Thus, on its face, the clause is proscribed by Section 8(e) unless it falls within the “construction industry proviso” relating to “on-site work.”

In *Teamsters, Local 467*, supra, the clause in question, article II, section 1 of the agreement provided:

Any employee may be discharged or disciplined for incompetency, inefficiency, insubordination, or any other good cause; provided, however, that no employee shall be discharged or discriminated against for upholding Union principles, including his refusal to cross a picket line (provided the Union has previously notified the employer of such picket line) . . . .

In *Laborers Local 300 (Jones & Jones)*, 154 NLRB 1744 (1965), the picket line clause stated:

IX . . . . It is further agreed that no employee shall be required to cross any picket line or enter any premises at which there is a picket line authorized or approved by the [union] . . . . The Employer . . . agrees that he will not assign or require any employee covered by this Agreement to perform any work or enter any premises under any of the circumstances above described . . . .

The Board held that since the record in the case supported a finding that a “further object” of the union’s picketing was to

force the Employer to agree to this “picket line” provision, and the picket-line clause was broad enough to apply to secondary picketing having no connection with disputes concerning job site subcontracting, it was prohibited by Section 8(e), and thus, the picketing by the union to compel the employer to sign a contract containing such a clause violated Section 8(b)(4)(A) of the Act.

Moreover, in *Painters Local 823 (Independent Painting Contractors of New Mexico)*, 161 NLRB 620 (1966), the picket-line clause read:

Section 5, paragraph 3-a. The employees covered hereby reserve the right to respect any picket line established by any labor organization, and it shall not be a violation of this agreement on the employees’ part to refuse to work behind a picket line.

The Board concluded that since this provision was in violation of Section 8(e), the union’s threats of economic action to force the employer to sign an agreement containing such a clause violated Section 8(b)(4)(A) of the Act.

Similarly, in *Teamsters Local 294 (Rexford Sand & Gravel Co.)*, 195 NLRB 378 (1972), a picket-line clause reading: “It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action in the event an employee refuses to go through any picket line,” was found to contravene Section 8(e) of the Act since in “immunizing from discipline or discharge ‘an employee (who) refuses to go through any picket line,’ would support secondary action.”<sup>15</sup> The Board found that because this language could support secondary action, the union, in threatening to picket the employer, had the object of forcing the employer to enter into a contract containing this clause, in violation of Section 8(b)(4)(A) of the Act.

Again, in *Teamsters Local 445 (Edward L. Nezelek, Inc.)*, 194 NLRB 579, 585 (1971), the Board affirmed an administrative law judges’ finding that a picket-line clause stating: “The Employer shall not discharge or suspend or otherwise discipline any Employee for refusing to cross a picket line, and such refusal shall not be considered a violation of this Agreement,” was broad enough to apply to secondary picketing having no connection with disputes concerning jobsite subcontracting, and to that extent was prohibited by Section 8(e) of the Act. By picketing the employer to sign an agreement containing the picket line clause and other clauses violative of Section 8(e), the union violated Section 8(b)(4)(A) of the Act.

And in *Bricklayers Local 2 (Gunnar I. Johnson & Son, Inc.)*, 224 NLRB 1021 (1976), the Board found that a picket-line clause stating, “Refusal to pass through a lawfully permitted picket line will not constitute a violation of the agreement,” violated Section 8(e) of the Act because it was “broad enough to apply to secondary picketing having no connection with disputes concerning jobsite subcontracting.”<sup>16</sup> This clause was overly broad on its face.

<sup>14</sup> *Bricklayers Local 2 (Gunnar I. Johnson & Son)*, 224 NLRB 1021 (1976), enf. 562 F.2d 775 (D.C. Cir. 1977); *Operating Engineers Local 12 (Robert E. Fulton)*, 220 NLRB 530 (1975); *Teamsters Local 445 (Edward L. Nezelek)*, 194 NLRB 579 (1971).

<sup>15</sup> See *Teamsters Local 55 (Anopolsky & Sons)*, 145 NLRB 722 (1963).

<sup>16</sup> The Board in *Bricklayers Local 2*, supra, stated:

I therefore find from the above and the facts in this case that the picket line clause at article IV, section 5 of the Independent Agreement clearly violates Section 8(e) of the Act.<sup>17</sup>

When ascertaining if an “object” of a strike is unlawful, the United States Court of Appeals in *Electrical Workers Local 480 v. NLRB*, 413 F.2d 1085 (D.C. Cir. 1969), held:

We agree that it would be impermissible for the Board to conclude from the secondary effect of picketing that it had a secondary object. The two must be kept separate . . . . A secondary effect is but one evidentiary factor which may shed light on the object of the actors.

Thus, the fact that a strike occurs is not dispositive of the objects of the strike even if as a consequence of the strike the Employer may have entered into an agreement that would violate Section 8(e) of the Act. Moreover, in ascertaining the object sought by the strike, it does not matter that the union formulates its objectives as a demand. “The parties well understood what alternative action was expected of the Company as a condition of the cessation of the picketing, without the necessity of formulating the specific demand. Nor is it of any importance that not all the objectives of the picketing were proscribed by Section 8(b)(4)(A).”<sup>18</sup>

The General Counsel has alleged that Local 32B-32J violated Section 8(b)(4)(ii) and (A) of the Act by striking where an object of the strike was to compel the Employer to sign a collective-bargaining agreement containing a picket line clause which is violative of Section 8(e) of the Act.

However, in *Longshoremen Local 1418 ILA (New Orleans Steamship Assn.)*, 235 NLRB 161, 169 (1978), in a decision affirmed by the Board, Administrative Law Judge Arthur Leff found:

Contrary to the General Counsel’s contention, I find that the record in this case does not support a finding of a violation of Section 8(b)(4)(ii)(A), separate and apart from the violation of Section 8(e) found above. Section 8(b)(4)(ii)(A) to the extent here pertinent makes it an unfair labor practice for a labor organization:

to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is:

(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

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It is clear from the legislative history of Section 8(e) that Congress intended to proscribe the entering into of a hot cargo clause as well as its subsequent enforcement, except to the extent that the construction industry proviso to that section exempts the entering into of agreements “relating to the contracting or subcontracting of work to be done at the site of the construction.”

<sup>17</sup> I do not find persuasive, Local 32B-32J’s arguments in its brief that the picket-line clause in the Independent Agreement was lawful. See *Teamsters Local 467 (Mike Sullivan & Associate)*, supra, and cases cited therein.

<sup>18</sup> *Longshoremen, Local 8 ILWU (General Ore, Inc.)*, 126 NLRB 172, 173 (1960). Also see, *Mine Workers, Local 1854 (Amax Coal Co.)*, 238 NLRB 1583, 1587 (1978), “The fact that one of the objectives of the strike was lawful does not, in any way, diminish the fact that the other objective was unlawful.”

Unlike Section 8(e) which prohibits voluntary agreements, Section 8(b)(4)(ii)(A) requires independent proof that the employer party was restrained and coerced.

Moreover, in *ABC Outdoor Advertising, Inc.*, 169 NLRB 113 (1968), Administrative Law Judge Thomas A. Ricci stated in his decision affirmed by the Board:

In support of its argument that Local 770 was striking unlawfully on April 24, the Respondent rests primarily upon those Board decisions holding that a union may not strike or picket to force the employer to agree to a written hot cargo contract provision. I cannot find on the record here that this was the purpose of the strike; the true objectives could as well have been the many company demands from which the Union had refused to recede . . . . This is supporting indication that the real disagreement which provoked the strike was a matter of money . . . . No precedent has been cited for a proposition of law that whenever a union, at any stage of bargaining negotiations, requests an unlawful hot cargo clause, any strike which follows is illegal regardless of how the respective positions of the parties may have changed in the intervening period, and I do not believe this to be the law.<sup>19]</sup>

In the instant case I cannot find that on the record the purpose of the strike was to compel the Employer to agree to the picket-line clause in the Independent Agreement, as a major objective thereof, or as it seems to me even one of the apparent objectives of the strike. The parties each knew full well what the Independent Agreement contained including the picket-line clause and yet this clause was never a topic of discussion or controversy between the parties until the Employer raised it as an issue after the striking employees sought to return to work and the Employer filed an unfair labor practice charge with the Board. Additionally, McGill admitted that the areas of contention between the parties were those included in his October 8, 1998 letter to Sturm. The evidence herein shows that these areas in dispute, i.e., wages, benefits, arbitration provisions, and duration of the contract, were economic and the real disagreement that provoked the strike.

From all of the above, I find and conclude that the General Counsel has failed to prove that Local 32B-32J violated Section 8(b)(4)(ii) and (A) of the Act by striking where an object of the strike was to compel Pratt Towers to sign a collective-bargaining agreement containing a picket line clause violative of Section 8(e) of the Act. I therefore grant the Respondent Union’s motion to dismiss the complaint.<sup>20</sup>

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<sup>19</sup> Citing *MV Liberator*, 136 NLRB 13, 20 (1962): In that case the Board held:

While one of the original objectives of the picketing was renewal of the Local 33 agreement, which contained an unlawful union-security clause, . . . the record neither shows that Local 33 was adamant in its union-security demand, nor that such demands were at any time a major objective of the picketing.

<sup>20</sup> Pratt Towers cites *Musician Local (Bow & Arrow Manor, Inc.)*, 206 NLRB 581 (1973), in support of its position herein that Local 32B-32J violated Sec. 8(b)(4)(A) of the Act. However, in that case the Board found that the union had violated Sec. 4(b)(4)(A) on the basis of the union’s following actions: The Board stated:

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We agree with the administrative law judge's conclusion that Respondent (union) violated Sec. 8(b)(4)(A) of the Act. He concluded that:

In this case, the Union induced and encouraged members of the Herman and Bruce orchestra[s] to cease work for their employers, Herman and Bruce, at the manor, unless the Manor executed the Union Form B agreement covering their working conditions, and further threatened, restrained, and coerced Herman and Bruce, as employers and independent contractors, to cease doing business with the Manor unless the Manor executed the Form B agreement, by inducing and encouraging their employees to strike, and by threatening Herman and Bruce with penalties under the Union's and the Federation[sic] Constitution, By-laws, orders and regulations. It would thus appear that General Counsel has made out his case in support of the allegation that the Union engaged in a violation of Section 8(b)(4)(i)(ii)(A) by seeking to obtain the Form B agreement with a clause of the character which the Board found unlawful in the *Patton Warehouse* case. [140

CONCLUSIONS OF LAW

1. Pratt Towers, Inc., is an employer engaged in commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act.

2. Local 32B-32J, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The picket-line clause, article IV, section 5 of the Independent Agreement is violative of Section 8(e) of the Act.

4. The Respondent Union, Local 32B-32J did not violate Section 8(b)(4)(ii) and (A) of the Act.

[Recommended Order for dismissal omitted from publication.]

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NLRB 1474, enfd. as modified 334 F.2d 539 (C.A.D.C., 1964).] Contrast the union's actions in *Associated Musicians*, supra with Local 32B-32J's conduct in the instant case.