JD(NY)–31-08
Egg Harbor, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 27, AFL-CIO

and **Case No. 4-CD-1188**

E.P. DONNELLY, INC.

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION NO. 623
(Party in Interest)

Henry Protas, Esq., Counsel for the General Counsel.
Robert O.Brien, Esq., O'Brien, Belland & Bushinsky, LLC, Counsel for the Respondent.
Louis Rosner, Esq., Counsel for the Employer.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on May 29, 2008 in Philadelphia, Pennsylvania. The Complaint herein, which issued on April 16, 2008 and was based upon an unfair labor practice charge that was filed on January 11, 2008 by E.P. Donnelly, herein called the Employer, alleges that Sheet Metal Workers' International Association, Local 27, AFL-CIO, herein called Local 27, or the Respondent, violated Section 8(b)(4)(ii)(D) of the Act by filing and maintaining a lawsuit in order to obtain certain work, even though the Board had issued a Section 10(k) Decision and Determination of Dispute awarding of the work in question to United Brotherhood of Carpenters and Joiners of America, Local Union No. 623, herein called Local 623, rather than to Local 27.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that the Employer has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, that it and Local 623 are each labor organizations within the meaning of Section 2(5) of the Act.

III. The Facts

The facts herein are straightforward and undenied. The Employer, a contractor in the construction industry, specializes in the installation of prefabricated standing seam metal roofs

and related jobs mostly in south and central New Jersey. It has maintained a collective-bargaining relationship with Local 623 since about 1999, and it is a signatory to the Carpenters' International Agreement, which binds it to the Local 623 agreements when working within its jurisdiction. Further, it employs a "core group" of seven or eight carpenter-represented employees and supplements this group by hiring additional carpenters, as needed, through the applicable local carpenter agreement.

On March 30, 2007[1] the Employer obtained a subcontract from Sambe Construction Company, Inc., herein called Sambe, to install prefabricated standing seam metal roofing and related work at the Egg Harbor Township Community Center project, herein called the Project, which is covered by a Project Labor Agreement, herein PLA. The signatories to the PLA are the Egg Harbor Township, Sambe, the South Jersey Building and Construction Trades Council, and certain local unions, including Local 27; Local 623 was not a signatory to the PLA. Upon entering into the subcontract with Sambe, the Employer signed a Letter of Assent agreeing to be bound by the PLA. Pertinent portions of the PLA are:

> This Agreement, together with the local Collective Bargaining Agreements appended hereto…represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project…[Article 2, Section 4]
>
> Where there is a conflict, the terms and conditions of this Project Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements. [Article 3, Section 1]
>
> The Contractors recognize the signatory Unions as the sole and exclusive bargaining representative of all craft employees who are performing on-site Project work within the scope of this Agreement…[Article 4, Section 1]

The PLA also provides for a procedure for resolving jurisdictional disputes, and appended to the PLA is a collective bargaining agreement between Local 27 and Sambe, effective June 1, 2006 through May 31, 2009, encompassing the disputed work in question.

On April 4, at a pre-job meeting provided for in the PLA, Sambe assigned the disputed work to the Employer, and Local 27 claimed the disputed work. On April 13, the Employer stated that it was assigning the work to employees represented by Local 623. On April 16, Local 27 invoked the PLA's provisions for settlement of jurisdictional disputes, resulting in a hearing before arbitrator Stanley Aiges on June 5; the Employer, Sambe and Local 27 participated in this hearing, Local 623 did not. On July 2, Aiges issued his decision awarding the disputed work to Local 27. The award states, *inter alia*: "For the reasons set forth above, I find that based on area practice within the jurisdiction of the South Jersey BCTC, Sambe/Donnelly violated the Egg Harbor Community Center PLA by assigning the disputed work to members of the Carpenters Union, Local 623. They are directed to reassign that work to members of Sheet Metal Workers Local 27." On June 26, Local 27 filed a grievance against Sambe and the Employer with the Local Joint Adjustment Board, herein LJAB, concerning the assignment of work at the Project. The LJAB met on July 16 to consider the grievance; although Sambe and the Employer were invited to attend, neither one did. On July 23 the LJAB issued its decision finding that Sambe and the Employer, by assigning the disputed work at the Project to Local 623 members rather than to Local 27 members, were in violation of the collective bargaining agreement, as well as

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2007.

the PLA and, additionally found that they failed to comply with the award issued by Arbitrator Aiges on July 2. The LJAB award concludes:

> Assuming the aforementioned work is not reassigned to Sheet Metal Workers from Local #27, the LJAB finds Sambe Construction Company, Inc. and E.P. Donnelly, Inc. jointly, severally and in the alternative responsible to pay fair and justifiable compensation to Sheet Metal Workers Local Union #27 for lost wages and benefits in the amount of $428,319.26, as determined by averaging the shop and field hours required to complete the project, as estimated by Local 27 contractors, and multiplying those hours by SMW Local Union #27's hourly rate of $67.42.

On April 30, Local 623 informed the Employer that the assignment of this work to another trade would be considered a breach of its contract and would result in a grievance, picketing or any other means available to preserve the work for its members. On May 2, the Employer filed Section 8(b)(4)(D) charges against both Local 623 and Local 27. The Board dismissed the charges against Local 27 and a Section 10(k) proceeding ensued on July 2, 3 and 5. On December 31, the Board issued its Decision and Determination of dispute at 351 NLRB No. 97 (2007). Based upon employer preference, current assignment and past practice, and economy and efficiency of operations, the Board awarded the work to employees represented by Local 623.

On June 27 and August 3, Local 27 filed a Complaint and a First Amended Complaint under Section 301 of the Act against the Employer, Local 623, Sambe and the New Jersey Regional Council of Carpenters. In the First Amended Complaint, Local 27 states, *inter alia*, that the Employer and Sambe have refused to abide by the award issued by Arbitrator Aiges, which award is legal and binding upon them as parties to the PLA of the Project, and that this refusal has caused damage to Local 27 and its membership, and that the Employer and Sambe have also refused to abide by the award issued by the LJAB, which also continues to damage Local 27 and its members. As a remedy, Local 27 requested the reassignment of the work to employees that it represents, monetary relief for the damages caused by the Employer and Sambe's breach of contract in accordance with the LJAB Award of July 23, permanent injunctive relief compelling them to comply with the PLA and Aiges' arbitration award, and permanent injunctive relief enjoining them from contracting work at the Project to any entity not a signatory to the PLA.

On March 27, 2008, Renee Marie Bumb, United States District Judge of the District Court for the District of New Jersey, issued an Opinion wherein she denied the Plaintiff's motion for summary judgment, without prejudice, and granted the Respondents' motion to vacate the LJAB award that issued on July 23. On June 25, 2008 the Respondent filed its Second Amended Complaint, amending its remedy request. In Count One of this Complaint, the Respondent requests that declaratory judgment be entered finding that the PLA is valid, legal and binding on the Employer and Sambe for the Project, and that Aiges' arbitration award is also valid, legal and binding on them "…to the extent that Arbitrator Aiges held that Donnelly and Sambe violated said PLA." Count Two requests "monetary relief" and costs and attorney's fees for the damage caused by the Employer and Sambe's breach of the PLA, and Count three requests damages for their breach of the New Jersey statutes. The important difference between this Second Amended Complaint and the earlier Complaints is that this latter Complaint does not request compliance with, and damages pursuant to, the arbitration award and the LJAB award. Rather, this Second Amended Complaint seeks "generic" monetary relief for the breach of the PLA and enforcement of the arbitration decision to the extent that the arbitrator found that the Employer and Sambe violated the PLA.

IV. Analysis

The Complaint before me alleges that Local 27 violated Section 8(b)(4)(D) of the Act by continuing to maintain this lawsuit in the United States District Court after the Board issued its 10(k) ruling on December 31 ordering that the work in question be assigned to employees who were represented by, or were members of, Local 623. As a defense, Local 27 points to certain Board language in its 10(k) determination in response to Local 27's contention that the Board "cannot make an affirmative award of the disputed work" because the PLA was authorized by New Jersey statute, which is not subject to preemption. In that regard, the Board stated:

> Local 27 thus appears to suggest that a Board award of the work in dispute to employees represented by Local 623 would effectively and impermissibly preempt New Jersey law authorizing public entities such as Egg Harbor Township to negotiate project labor agreements. An award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute project labor agreements, nor would it invalidate the PLA. *The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA.* [Emphasis added]

In addition to arguing that this language in the Section 10(k) Determination permitted (in fact, encouraged) the Respondent to act as it did, the Respondent has two additional defenses herein. That even without this language, its Second Amended Complaint does not go over the line in seeking to abrogate or undermine the effect of the Section 10(k) Determination, and that under *Bill Johnson's Restaurant v. NLRB 461 U.S. 731 (1983)* and *BE&K Construction Company*, 351 NLRB No. 29 (2007), the Board cannot find a violation enjoining its Second Amended Complaint because its lawsuit was "reasonably based."

The law is clear (at least it was prior to December 31, when Board issued the 10(k) Determination herein) that any post-award conduct (usually picketing, grievances or a lawsuit) by the losing party in a Section 10(k) proceeding that undermines that determination is unlawful. In *Local 30, United Slate (Gundle Lining Construction Corp.)*, 307 NLRB 1429, 1430 (1992), the Board stated: "Such post-award conduct is properly prohibited under Section 8(b)(4)(D) because it directly undermines the 10(k) award, which under the congressional scheme, is supposed to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." The Court, at 1 F.3d 1419, 1426 (3rd Cir. 1993), in enforcing, stated: "The pursuit of a section 301 breach of contract suit that directly conflicts with a section 10(k) determination has an illegal objective and is enjoinable as an unfair labor practice under Section 8(b)(4)(ii)((D)." And in *Iron Workers, Local 433 (Otis Elevator Company)*, 309 NLRB 273, 274 (1992), the Board said, "…allowing the losing party in a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award."

I find that all of the Complaints filed in its 301 suit, including the Second Amended Complaint, tend to undermine the Board's Section 10(k) Determination herein. The original Complaint and the First Amended Complaint clearly undermined the 10(k) determination by requesting the reassignment of the work that the Board awarded to Local 623, ordering that the parties comply with the arbitration award and requesting monetary relief in accordance with the LJAB award. While the Second Amended Complaint is an improvement over the earlier Complaint it still tends to undermine the Board's earlier Determination. There is nothing improper in Count One, which requests a finding that the PLA is valid and binding upon the Employer and Sambe and that the arbitration award, to the extent that it found that the

Employer and Sambe violated the PLA, is also valid and binding on them. However, Count Two requests monetary relief for damages caused by the Employer and Sambe's breach of the PLA. Although, on its face, this appears to be less objectionable than the demands in the earlier Complaints, the end result is the same as if the Respondent had requested that the Employer and Sambe pay damages in accordance with the LJAB award- that they would have to pay damages for assigning the work to Local 623 members, as the Board determined in its 10(k) Determination, thereby undermining that ruling. I therefore find that *under normal circumstances,* by filing and maintaining its Second Amended Complaint, the Respondent violated Section 8(b)(4)(D) of the Act. This is where the Respondent's principal defense comes in, *i.e.* the language contained on page 4 of the Board's Determination.

Prior to deciding the merits of the dispute, the Board stated that awarding the work to Local 623 would not prevent the township from exercising its authority under state law to negotiate or execute agreements, nor would it invalidate the PLA. More relevant, and confusing, is the language that follows: "The employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA." The Respondent (correctly) points out that is all that it did herein, and therefore the Complaint should be dismissed. I, reluctantly, disagree for two reasons. As stated by Counsel for the General Counsel, in his brief, if the Board wanted to overrule such longstanding precedent, as the Respondent argues it meant to do, it would have specifically stated that it was doing so, but it did not do so. In addition, if the Board really meant to say what the Respondent alleges, it should be for the Board to so state rather than for me to make that determination and overrule longstanding precedent.

Finally, the Respondent defends that under *BE &K, supra,* there can be no finding of a violation herein, which would enjoin its lawsuit; I disagree. Initially, I find that because the Second Amended Complaint, if successful, would undermine the Board's 10(k) Determination, it was not "reasonably based," *i.e.* the Respondent must have been aware that it conflicted with that Determination and would therefore be subject to challenge. In *Northern California District Council of Laborers (W.B. Skinner, Inc.),* 292 NLRB 1035 (1989), the Board stated:

> The Board issued a decision under Section 10(k) of the Act awarding certain disputed work to employees of W.B. Skinner who were represented by IBEW Local 202, rather than to employees who were represented by Respondents. That decision put the Respondents, who fully participated in the 10(k) hearing, on notice that there was no longer any reasonable basis for continuing to prosecute the lawsuit that they filed prior to the 10(k) award to confirm a contrary arbitral award.

See also *Longshoremen ILWU Local 32 (Weyerhaeuser), 271 NLRB 759 (1984) and ILWU, Local 13 (Sea-Land)*, 290 NLRB 616, 617 (1988). In addition, as Counsel for the General Counsel states in his brief, *BE &K, supra*, did not affect footnote 5 in the Supreme Court's Decision in *Bill Johnson's, supra*, which states: "We are not dealing with…a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits." As I have found that the Respondent's suits herein violate the Act because they undermine the Board's 10(k) Determination, they can be enjoined.

Based upon all of the above, I find that by bringing and maintaining its Section 301 lawsuit, including the Second Amended Complaint on June 25, 2008, the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

Conclusions of Law

1. E.P. Donnelly, Inc. has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association, Local 27, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 have each been labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining its Section 301 lawsuit against the Employer and Sambe after the Board issued its Section 10(k) Determination, the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. As stated above, the difficulty that I had with the Respondent's lawsuit was its request for damages. Whether it was stated as damages for breach of the PLA and a violation of the New Jersey statutes (as set forth in the Second Amended Complaint), or as a request that the Employer and Sambe be ordered to comply with the LJAB and the arbitrator's award and pay damages pursuant to those awards, the result is the same. The Employer and Sambe would be penalized for complying with the Board's Section 10(k) Determination, thereby undermining that determination. I recommend that the Respondent be ordered to delete from its Second Amended Complaint Paragraphs B and C in its remedy request for Count One, as well as its entire remedy request for Counts Two and Three or, in the alternative, to withdraw the lawsuit in its entirety.

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended[2]

ORDER

The Respondent, Sheet Metal Workers' International Association, Local 27, AFL-CIO, its officers, agents and representatives, shall

1. Cease and desist from

(a) Threatening, coercing or restraining E.P. Donnelly, Inc., or any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require Donnelly to assign the work of installing prefabricated standing seam metal roofing, soffit, fascia and related trim on the Community Center Project in Egg Harbor Township, New Jersey, to employees who are members of, or are represented by, Local 27, rather than to employees who are members of, or represented by, Local 623.

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[2] 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.

(b) Maintaining a lawsuit entitled *Sheet Metal Workers International Association Local 27, AFL-CIO v. E.P. Donnelly, Inc. et al.* in the United States District Court for the District of New Jersey, insofar as this, or any lawsuit that it maintains, requests that the Employer and/or Sambe comply with the terms of the LJAB or the arbitrator's award herein, or requests monetary damages for their failure to assign the disputed work to employees who are members of, or are represented by, the Respondent or the Sheet Metal Workers' International Association.

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

(a) Withdraw the remedy requests located in Paragraphs B and C contained in Count One and the entire remedy request contained in Counts Two and Three of its Second Amended Complaint or, in the alternative, withdraw the lawsuit. Either way, within 7 days, notify the Employer of its action.

(b) Reimburse, with interest, payments, if any, that were made by E.P. Donnelly and/or Sambe to the Respondent pursuant to the award of the LJAB or the arbitrator, following the Board's Section 10(k) Determination issued on December 31, 2007. Interest to be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days after service by the Region, post at its union office and hiring hall in Farmingdale, New York, as well as any other offices it maintains, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

Dated, Washington, D.C., August 18, 2008.

Joel P. Biblowitz
Administrative Law Judge

[3] 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."

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a lawsuit seeking to require E.P. Donnelly, Inc. and Sambe Construction Company, Inc. to pay monetary damages to us, with an object of forcing them to assign certain work to individuals who are members of, or are represented by us, contrary to a ruling by the National Labor Relations Board at 351 NLRB No. 97 (2007) in which the Board awarded the work to employees who were represented by United Brotherhood of Carpenters and Joiners of America, Local Union No. 623.

WE WILL withdraw our request for monetary damages in our lawsuit against Donnelly and Sambe or, in the alternative, **WE WILL** withdraw this lawsuit in its entirety.

WE WILL reimburse, with interest, Donnelly for any payments it may have made to us for the above described work following the issuance of the Board's Section 10(k) Determination.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 27, AFL-CIO
(Labor Organization)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.