Iron Workers Local No. 783, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO *and* BE&K Construction Company. Case 18–CB–2021

April 21, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On May 28, 1993, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] finding that the Respondent did not violate Section 8(b)(1)(A) of the Act as alleged.

More specifically, the Board affirmed the administrative law judge's conclusion that the evidence as a whole did not support the fundamental allegation of the complaint, i.e., that the Respondent violated Section 8(b)(1)(A) of the Act by participating in a riot at the Charging Party's man-camp employee housing compound in International Falls, Minnesota, on September 9, 1989, by burning the camp to the ground, and by otherwise threatening employees and destroying property.

The Board also affirmed the judge's conclusion that the Respondent did not condone or ratify any misconduct on the part of its members by failing to discipline them or by assisting those who were arrested in conjunction with the riot.[2]

The Charging Party thereafter filed a petition for review of the Board's Order with the United States Court of Appeals for the Eighth Circuit. On May 12, 1994,[3] the court issued its opinion,[4] reversing the Board's Decision and Order.

Although the court found that there was evidence tending to indicate that the Respondent instigated or participated in the wrongful conduct that occurred at the man-camp,[5] the court did not ultimately find that the Respondent actually engaged in any unlawful conduct *before or during* the riot.[6] Rather, the court found that the Respondent, through its actions following the destruction of the man-camp, committed an unfair labor practice by subsequently ratifying, condoning, adopting, and failing to disavow the unlawful actions of its members at the man-camp.[7] Thus, the court concluded that:

> [T]he Board was in error in its failure to find that the [Respondent], through its officers and agents, thereafter [i.e., after the morning of the riot] ratified, condoned and adopted the unlawful conduct of many of its members, and affiliated union ironworkers, on September 9, 1989, and that this conduct, together with evidence of its involvement preceding the riot, constituted an unfair labor practice.[8]
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> Because the strong and convincing proof in this case demonstrates condonation and ratification by the [Respondent] under longstanding agency principles, we conclude that the [Respondent] is guilty of the unfair labor practice charges made against it. This proof is buttressed by evidence that the [Respondent], through its agent LaVallee, also actively participated or assisted in violent acts against BE & K, its employees, and subcontractors. We make no finding, however, that the ALJ erred in his somewhat ambivalent conclusions about the [Respondent's] actual participation.[9]

The court remanded the matter to the Board for further proceedings consistent with the court's opinion. On September 8, the Board advised the parties that it had accepted the remand and invited them to submit statements of position with respect to the issues raised by the remand. On September 12, the Respondent petitioned the United States Supreme Court for a writ of certiorari. On October 4, the Respondent and the Charging Party each submitted statements of position on remand to the Board. On January 9, 1995, the Supreme Court denied the Respondent's petition for a writ of certiorari.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have considered the statements of position. We accept the court's opinion as the law of this case. Accordingly, we shall order the Respondent to cease and desist from engaging in the unlawful conduct found by the court and to take certain affirmative action designed to effectuate the purposes of the Act.

1. In its statement of position, the Charging Party has requested that the Respondent be ordered to

> [Cease and desist] from engaging in the unlawful conduct involved in this case, and any like or related manner, against employees of BE&K [1] at any other location . . . [2] specifically . . . including but not limited to, physical assaults, personal attacks, violence, massing, blocking ingress and egress, arson, destroying property, breaking

[1] 311 NLRB 734.
[2] 311 NLRB at 734, 743.
[3] All dates are 1994 unless otherwise stated.
[4] 23 F.3d 1459.
[5] Id. at 1469, 1470.
[6] Id. at 1465, 1470.
[7] Id. at 1465–1467, 1470.

[7] Id. at 1465.
[9] Id. at 1470. As seen, the administrative law judge concluded that the evidence as a whole did not support the fundamental allegation of the complaint; i.e., that the Respondent violated Sec. 8(b)(1)(A) of the Act by participating in the riot at the Charging Party's man-camp, by burning it to the ground, and by otherwise threatening employees and destroying property. 311 NLRB at 742.

windows, overturning vehicles, burning housing, vandalizing automobiles, assaulting employees, trespassing, using obscene or violent language, threatening violence, attempting to or threatening to do any of these acts against employees of BE&K or [3] any other employer and their families at any project.

We find that such a provision is not warranted under the circumstances. First, in regard to aspects 1 and 3 above, when determining generally whether an order shall apply to all of an employer's employees or only those at the location where the violation occurred, the Board considers whether the conduct was systemwide, centrally directed, and part of a coordinated policy to commit unfair labor practices.[10] The Board focuses on these same factors in determining the scope of an order against a union that has violated the Act.[11]

Applying those considerations to the facts here, we note that there is no allegation and no showing that the Respondent has engaged in unfair labor practices against the Charging Party at locations other than the International Falls man-camp, and that there is also no allegation or showing that the Respondent's unfair labor practices were committed in furtherance of a Respondent-wide policy to commit such unfair labor practices.[12] Accordingly, we find that the circumstances do not warrant the issuance of an extraordinary order that extends to the Respondent's conduct at any locations other than International Falls, or to employees of employers other than the Charging Party. In regard to aspect 2, above, of the Charging Party's requested cease-and-desist provision, seeking to have certain crimes and offenses specifically included therein, we note that the court did not find that the Board erred in affirming the judge's conclusion that the Respondent did not violate Section 8(b)(1)(A) by its conduct up to and including the morning of the riot.[13] Rather, the court concluded that the Board erred in failing to find that the Respondent, through its officers and agents, *after* the morning of the riot, ratified, condoned, and adopted the unlawful conduct of many of its own members and affiliated union ironworkers, and that this conduct, ''together with evidence of the Respondent's involvement preceding the riot, constituted an unfair labor practice.''[14] Thus, the court did not find that the Respondent actually engaged in any unlawful conduct *before or during* the riot.[15]

We also note that less than 2 percent of the Respondent's membership at the time of the events in question (4 of approximately 315 members) were shown to have engaged in unlawful conduct at the man-camp, and that this in turn is less than 7 percent of the total of 59 people who were convicted of rioting at the man-camp, and less than one percent of the approximately 450 people who were estimated to have participated in the riot.

Under these circumstances, and in light of the court's finding, we find that the record does not support the Charging Party's request for the broad, particularized cease-and-desist requirement against the Respondent set forth above in aspect 2 of the Charging Party's requested cease-and-desist provision.

2. The Charging Party has also requested that in addition to ordering the Respondent to post the attached notice at its business offices, meeting halls, hiring halls, and other places where notices to members are customarily posted, we should also order the Respondent to (1) mail copies of the attached notice to all of its members, (2) publish the notice at least twice in any publication distributed by the Respondent to its members, (3) publish the notice at least three times within a 3-week period in newspapers of state-wide circulation within the States of Michigan and Minnesota, (4) publish the notice in a newspaper of general circulation in International Falls, Minnesota, and (5) publish the notice in a publication of national circulation, such as USA Today or The Wall Street Journal.

In support of this requested publication requirement, the Charging Party asserts that (1) the Respondent's members ''are spread over a large geographic area;'' (2) ''many [members] probably do not visit [the Respondent's] offices within a 60-day period;'' (3) ''many of the victims of [the Respondent's] unlawful conduct were residents throughout the state of Minnesota, and not just in International Falls;'' (4) ''many BE&K employees who were the intended victims of [the Respondent's] unlawful acts were recruited by BE&K from throughout the United States, and since the project has been completed for several years, most of these individuals no longer live or work in the area;'' (5) and ''many potential applicants and employees, because of the magnitude of the riot and the pub-

[10] *Carpenters (Reeves, Inc.)*, 281 NLRB 493, 499 (1986).

[11] Id.

[12] While we thus adhere to the above legal principles set forth in *Carpenters*, supra, we note that the particular pertinent facts in that case are materially different from those in this one. Thus, in *Carpenters*, the union violated Sec. 8(b)(1)(A) by repeatedly engaging in mass picketing and blocking ingress to employees and contractors of two different employers at two separate construction sites on a total of 7 days over a 5-week period. Under those circumstances of frequent and repeated unlawful activity against multiple employers, the Board agreed with the administrative law judge that the union's conduct warranted an order that reached both employers at any worksites where their employees were engaged in performing construction work. 281 NLRB at 499.

[13] 23 F.3d at 1465.

[14] Id.

[15] Id. at 1465, 1470. Cf. *Mine Workers District 2 (Mears Coal)*, 173 NLRB 665, 668–669 (1968), enfd. 429 F.2d 141 (3d Cir. 1970) (union officials present, aware, and passive while group comprised of union members engaged in acts of violence against official of rival union).

licity it received, left the area and returned to their states of residence or did not come to the project to work.''[16]

We do not find the extraordinary publication measures requested by the Charging Party to be warranted in order to remedy the unlawful conduct found by the court. We find that posting of the notice by the Respondent, as well as providing copies of the notice for posting by the Charging Party, are adequate remedial steps in light of the violations found.

The Charging Party's reliance on *Electrical Workers IBEW Local 3 (Hunts Point Electrical)*, 271 NLRB 1580 (1984), and *Electrical Workers IBEW Local 3 (Northern Telecom)*, 265 NLRB 213 (1982), in support of its request is misplaced. In those cases, the Board ordered the union to (1) publish the Board's remedial notice in the union's semimonthly internal publication, (2) mail copies of the publication to each union member, and (3) publish the terms of the remedial notice in a daily newspaper of general circulation in the metropolitan New York area on 3 separate days within a 3-week period. But the Board found that the union in those cases was an unrecalcitrant recidivist, with a proclivity and general scheme for violating the Act, and it was reasonable to anticipate that the union would continue to violate the Act. Thus, the traditional notice posting was found to be insufficient to notify all parties. 271 NLRB at 1589; 265 NLRB at 218–219. No such circumstances exist in this case.

The Charging Party's reliance on *Masters, Mates & Pilots (Marine Transport)*, 301 NLRB 526 (1991), in support of the requested remedial publication is also unavailing. There, in ordering that the remedial notice be published in an issue of the respondent union's official newspaper, the Board found that the normal posting of the notice might not have been sufficient to advise all of the union's members of the relief granted, because the union's members were frequently employed at sea for periods well in excess of the 60-day notice-posting period. Again, there is no comparable circumstance in this case.

3. The Charging Party has also requested that the Respondent be ordered to make its ''victims'' whole, including backpay to any employees or applicants for employment with the Charging Party, or with any other employer on the International Falls project, who lost wages as a result of the riot because they were unable to work during the periods when they would have been otherwise employed by the Charging Party or other employers at the project. In addition, the Charging Party requests that the Respondent be ordered to reimburse such employees, applicants, and the Charging Party for the cost and related expenses of providing alternative housing and food to employees as a result of the destruction of the man-camp.

[16] Charging Party's Statement of Position at 4–5.

We note again that the court has not found that the Respondent actually engaged in any unlawful conduct *before or during* the riot, and that of the 59 individuals who were ultimately convicted of rioting at the man-camp, only 4 were members of the Respondent, representing less than 1 percent of the 450 people who were estimated to have participated in the riot. Thus, we find that it would be inappropriate on those grounds alone to impose the requested make-whole and reimbursement remedy on the Respondent for the consequences of the riot.

Moreover, a backpay order is not appropriate in any event where—as here—a union's unfair labor practice involves solely interference with an employee's right of ingress to his place of employment.[17]

In *Long Construction*, the union violated Section 8(b)(1)(A) when its business representative led a group of about 75 to 100 men to the employer's construction site, where members of a 40- to 50-man subgroup led by the union business representative assaulted nonunionized employees of the employer by (1) breaking one's jaw, knocking out his teeth, knocking him unconscious, and rendering him unable to work for 2 months; (2) knocking another unconscious; (3) striking a foreman (who had come to the aid of an attacked employee) with brass knuckles; (4) shooting (with pistols) at another employee; (5) beating up another employee as he was trying to escape from the group; and (6) striking and knocking out another employee as he attempted to rescue his son from being attacked by the group, rendering the father unable to work for a month.[18]

The Board found that, while it customarily orders backpay as part of a remedial order in situations where a union has caused an employer to discriminate with respect to an employee's terms of employment, it would not effectuate the policies of the Act for the Board to order backpay or other compensatory relief in situations where a union interferes with an employee's right of ingress to his place of employment, in violation of Section 8(b)(1)(A). The Board stated:

> We are dealing here with conduct which, though violative of the Act, is not beyond the reach of State power. The Act generally preempts State authority with respect to conduct within [the Act's] purview. However, it does not preempt State authority to deal with breaches of the peace stemming from the use of force and violence in labor disputes. The States can act to enjoin such conduct, and they can remedy the consequences of

[17] *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554, 556 (1963). Accord: *Union de Tronquistas, Local 901 (Lock Joint Pipe)*, 202 NLRB 399 (1973).

[18] The union business representative who led the attacking group did not actually inflict any of the physical beatings himself. 145 NLRB at 559 fn. 11.

> such conduct. It is thus apparent that the lack of a Board order, awarding backpay to employees unable to work because of injuries resulting from this unlawful conduct, will not leave such employees without redress against those responsible for their injuries.
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> In these circumstances, we conclude that it best effectuates the policies of the Act not to extend the scope of our remedial power beyond that of the traditional cease-and-desist order for the following reasons: (1) The cease-and-desist order, in conjunction with the utilization of the contempt procedures provided in the Act, is well designed to prevent the recurrence of the unfair labor practices and to vindicate public rights; (2) to the extent that the Board has power to award backpay to employees injured by Respondent's violent conduct, such power derives from the effect of such conduct on the employee's employment relationship; yet the employee's loss of pay may be only a small part of the total required to make him whole, which total may well include medical expenses as well as compensation for physical injury and pain and suffering; (3) to the extent that satisfaction of individual claims which are primarily private in nature may also serve to further the public interest in obtaining the peaceful resolution of labor disputes, such interest is equally well served by the individual's resort to those remedies traditionally used to process claims resulting from another's tortious conduct; (4) the numerous and complicated factual questions involved in settling such claims are not such questions as fall within the Board's special expertise, but do fall within the special competence of judge and jury; and (5) in our opinion, our exercise of such authority as may reside in the Board to award compensatory relief might well exert an inhibitory effect on the exercise of State authority, and would, in any event, complicate and confuse the issue, to the possible detriment of the employees whose rights we seek to protect. [145 NLRB at 555–556; citations omitted.]

In *Lock Joint Pipe*, supra, the striking and picketing union violated Section 8(b)(1)(A) when representatives and agents of the union on several occasions threatened nonstriking employees with reprisals and physical harm if they attempted to cross the picket line; on two occasions severely damaged the automobiles of an employee and an employer official; and attempted to force the moving vehicle of a nonstriking employee off the road, and then shot out the vehicle's tires with a pistol.

Expressly relying on *Long Construction*, supra, the Board majority in *Lock Joint Pipe* declined to order backpay for all employees who lost work as a result of the union's unlawful conduct. The Board stated:

> The extension of backpay liability to a situation where, as here, only picket line misconduct has occurred involves important considerations going to the heart of the right to strike under Sections 7 and 13 of the Act. . . . [W]e deplore and in no way condone [violence and the threat of violence]. However, adequate remedies under the Act other than backpay exist to prevent the occurrence of violence without interfering with the right to strike [citing *Long Construction*, and referring to cease-and-desist orders, injunctions under Section 10(j), contempt proceedings, and denial of bargaining orders to remedy an employer's unfair labor practices].
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> To do more, in our opinion, runs the risk of inhibiting the right of employees to strike to such an extent as to substantially diminish that right. For the misconduct of a few pickets may be sufficient to find the union in violation of Section 8(b)(1)(A) and enough to intimidate many employees. Faced with this financial responsibility, few unions would be in a position to establish a picket line. In our opinion, union misconduct of this nature, while serious, does not warrant the adoption of a remedy so severe as to risk the diminution of the right to strike, a fundamental right guaranteed by Sections 7 and 13 of the Act. [202 NLRB at 399–400; citations omitted.]

Thus, for the policy reasons marshalled in *Long Construction* and echoed in *Lock Joint Pipe*, we find that it would not effectuate the policies of the Act for the Board to award backpay or other compensatory relief in this situation.[19]

Iron Workers Local 111 (Northern States),[20] relied on by the Charging Party in this regard, is inapposite. There, the Board found that the union violated Section 8(b)(1)(A) of the Act by discriminatorily refusing to accept properly tendered travel service dues from travelers and by threatening to file intraunion charges against the travelers, and that it violated Section 8(b)(2) by attempting to cause the employer to lay off travelers and hire local union members in their place. As a part of its remedy for these violations, the Board ordered the union to pay backpay to the discriminatees

[19] See generally *Drobena v. NLRB*, 612 F.2d 1095 (8th Cir. 1980) (court declines to disturb valid longstanding *Lock Joint Pipe* policy, but notes that the members of the court panel in the case at hand do not think highly of the policy as applied to the case).

[20] 298 NLRB 930 (1990), enfd. 946 F.2d 1264 (7th Cir. 1991), supplementing 274 NLRB 742 (1985), enf. denied and remanded in pertinent part 792 F.2d 241 (D.C. Cir. 1986).

who lost employment as a result of the union's conduct.

Unlike *Long Construction*, supra, *Lock Joint Pipe*, supra, and this case, the loss of employment suffered by the discriminatees in *Northern States* was not attributable to union strike or picket line misconduct or violence, and thus the policy considerations against awarding backpay under such circumstances, articulated in those cases and relied upon here, were not present in *Northern States*. Indeed, in awarding backpay, the Board in *Northern States* drew this very distinction, stating:

> We do not, however, disturb the Board's doctrine . . . embraced in such cases as *Long Construction*, supra, and [*Lock Joint Pipe*], of declining to grant backpay awards for losses attributable to strike or picket line union misconduct directed against employees where there has been no employer culpability. This case does not present that issue, but, as explained below, our decision awarding backpay here is not inconsistent with continuing to withhold backpay remedies in the strike-related cases. [298 NLRB at 931.][21]

4. The Charging Party has also requested that the Respondent be required to reimburse the Charging Party, other employers, employees of the Charging Party, and applicants for employment with the Charging Party, for any damage to their property, or expenses incurred, as a result of the Respondent's unlawful conduct on September 9, 1989. We deny this request.

In *Roofers Local 30 (Associated Builders)*, 227 NLRB 1444 (1977), the Board stated:

> This Board has long held that employees legally damaged by the tortious conduct of unions might be better served by pursuing those private remedies traditionally used for the recovery of such damages [citing, inter alia, *Lock Joint Pipe*]. We are persuaded that the same policy considerations obtain where employers are legally damaged by the tortious conduct of unions. In both instances, private remedies traditionally used for the recovery of such damages would bring employees and employers before tribunals which have more experience and are better equipped than this Board to measure the impact of tortious conduct, including violence, and to make victims whole.

Applying this principle to this case, we deny the Charging Party's request for an award of property damages.[22]

5. The Charging Party has also requested that the Respondent be required to reimburse the Charging Party for its litigation costs and expenses, including attorneys' fees. We find that the Respondent's defenses to the unfair labor practice allegations against it were not frivolous. Accordingly, we deny the Charging Party's request.[23]

ORDER

The Respondent, Iron Workers Local No. 783, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, Marquette, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Ratifying, condoning, adopting, and failing to disavow the unlawful conduct of its members and affiliated union iron workers in the course of their participation in the rioting at, and the destruction of, BE&K Construction Company's employee man-camp in International Falls, Minnesota, on September 9, 1989;

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Post at its business offices, meeting halls, hiring halls, and other places where notices to members are customarily posted by the Respondent, copies of the attached notice marked ''Appendix.''[24] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Provide the Regional Director with signed copies of the notice in sufficient number for posting by BE&K Construction Company, if it so agrees, at places where it customarily posts notices to employees.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[21] The court of appeals, in enforcing the Board's order in *Northern States*, noted the same distinction. 946 F.2d at 1267 fn.2.

[22] See also *District 1199, Health Care Employees (Francis Schervier)*, 245 NLRB 800, 806–807 (1979) (noted by the Charging Party); *Teamsters Local 612 (Deaton Truck)*, 146 NLRB 498, 506 fn. 12 (1964) (inappropriate to grant an award of monetary damages). See generally *National Maritime Union (Texas Co.)*, 78 NLRB 971, 989–991 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950).

[23] *Heck's Inc.*, 215 NLRB 765 (1974). See also *Truck Drivers Local 705 (Gasoline Retailers)*, 210 NLRB 210, 212, 277 fn. [10]2 (1974).

[24] 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 EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

WE WILL NOT ratify, condone, adopt, or fail to disavow the unlawful conduct of our members and affiliated union iron workers in the course of their participation in the rioting at, and the destruction of, BE&K Construction Company's employee man-camp in International Falls, Minnesota, on September 9, 1989.

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

IRON WORKERS LOCAL NO. 783, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL–CIO