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Hearn Construction and Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America. Case 20-CA-33534

June 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On March 10, 2009, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs. All parties filed answering briefs.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order.⁴

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, ___ F.3d ___, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed ___ U.S.L.W. ___ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for rehearing filed Nos. 08-1162, 08-1214 (May 27, 2009).

² The General Counsel's motion to strike the Respondent's brief in support of its exceptions is denied inasmuch as the brief substantially complies with the requirements of Sec. 102.46 of the Board's Rules and Regulations. See *La Gloria Oil & Gas Co.*, 337 NLRB 1120 fn. 1 (2002).

³ The Respondent excepts 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.

We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) by causing the arrest of Union representatives who were engaged in lawful Sec. 7 activity on public property. We do not pass on the judge's alternative theory of violation that assumes, arguendo, Union Representative Trent Schager was arrested for trespass on private property. We also find no need to pass on the General Counsel's alternative theory of violation under *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Finally, we do not pass on the General Counsel's

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hearn Construction, Vacaville, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kathleen C. Schneider and *Jason Wong* for General Counsel.
Dennis B. Cook of Sacramento, California, for Respondent.
Matthew J. Gauger of Sacramento, California, for the Charging Party.
David Alderson of Fairfield, California for the City of Fairfield, California.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. Hearing in this case was held in San Francisco, California, on December 9, 2008, pursuant to the complaint and notice of hearing issued by the Regional Director for Region 20 of the National Labor Relations Board on October 31, 2007. The complaint is based on a charge filed on August 10, 2007, by Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America (the Union). The complaint alleges that Hearn Construction¹ (Respondent) caused the arrest of two representatives of the Union in violation of Section 8(a)(1) of the National Labor Relations Act.²

All parties were provided full opportunity to appear, to introduce relevant evidence, to examine and cross examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the briefs filed by counsels

exception to the judge's failure to find a separate 8(a)(1) violation for the Respondent's conduct in denying union representatives access to, and seeking their removal from, public property. Such a finding would be cumulative of the violation found and would not materially affect the remedy for the Respondent's misconduct.

There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by threatening to cause the arrest of union representatives.

⁴ We deny the Charging Party's request for extraordinary remedies because we find that the Board's traditional remedies for the unfair labor practice found herein are sufficient.

¹ The name of Respondent appears as corrected at the hearing.

² 29 U.S.C. §158(a)(1).

³ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credi-

for the General Counsel, the Union, and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Respondent, a general contractor in the construction industry, is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act

Respondent admits and I find that at all material times it has been a general contractor in the construction industry performing both residential and commercial construction. During a relevant 12-month period, Respondent admits that it provided services valued in excess of \$50,000 to enterprises located within the State of California and that these enterprises each met the Board's standards for the assertion of jurisdiction on the basis of direct involvement in interstate commerce. Thus, Respondent admits that it meets the Board's standards for assertion of jurisdiction on the basis of indirect involvement in interstate commerce. Based upon these facts, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act

The complaint alleges that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Respondent admits this allegation and I so find.

In May 2007,⁴ Respondent began work at the southwest corner of the intersection of Mangels Boulevard and Business Center Drive in Fairfield, California, constructing an administrative headquarters facility for NorthBay Healthcare.

In January 2007, Respondent entered into construction contracts for a headquarters building for NorthBay Healthcare at the southwest corner of Mangels Boulevard and Business Center Drive (the jobsite) in Fairfield, California. The jobsite encompassed both public and private land. Pursuant to Section 16.4.3 of the Fairfield City Code, Respondent received an encroachment permit in February⁵ to perform some of the headquarters work within the public right-of-way. The public right-of-way work included grading, landscaping, irrigation and sidewalk installation.⁶

Respondent began work in May. Respondent enclosed both the public and private land by erecting a chain-link fence

around the jobsite.⁷ The chain-link fence along the north and west sides of the project followed Mangels Boulevard as it curved toward the intersection with Business Center Drive. The chain-link fence on Mangels Boulevard abutted the back edge of the curb, i.e., the portion of the curb furthest from the street. Thus, inside the Mangels Boulevard chain-link fence, approximately the first 25 feet of property abutting the fence was public property. Immediately outside the fence were the curb and then a lane of traffic.

around the jobsite.⁷ The chain-link fence along the north and west sides of the project followed Mangels Boulevard as it curved toward the intersection with Business Center Drive. The chain-link fence on Mangels Boulevard abutted the back edge of the curb, i.e., the portion of the curb furthest from the street. Thus, inside the Mangels Boulevard chain-link fence, approximately the first 25 feet of property abutting the fence was public property. Immediately outside the fence were the curb and then a lane of traffic.

Respondent was granted an easement onto property just south of the jobsite

In addition to the jobsite property, Respondent utilized a temporary construction easement onto the adjoining property immediately south of the jobsite (the easement area).⁸ This easement included a right to access for construction vehicles and other reasonable access in connection with construction of the headquarters facility. The property on which the easement area was located was owned by NorthBay Healthcare Group. The property was enclosed by a barbed-wire fence and was separated from the jobsite by the chain-link construction fence.

The Union was involved in an area standards dispute with Sommerkal Construction, Inc., a nonunion concrete subcontractor at the jobsite

Union field representative Mike Johnson first visited the jobsite in May. He spoke with Sommerkal foreman John (last name unknown) and Sommerkal nonunion carpenter Andrew Schmidt. In a conversation with Schmidt, Johnson ascertained Schmidt's wages and benefits and concluded that they did not meet the area standards negotiated by the Union. By letter dated June 22, the Union wrote to Sommerkal that it understood that Sommerkal did not pay the wages and fringe benefits established by the Union in the geographic area in which Sommerkal was working thus undermining the conditions established by the Union for its members. The letter disclaimed any interest in representation. Additionally, the letter requested that Sommerkal furnish any information contrary to the Union's understanding that Sommerkal did not pay area standard wages and benefits. The Union received no response from Sommerkal.

On June 29, the Union began picketing at the jobsite

After ascertaining that Sommerkal was at the jobsite, the Union began picketing on June 29. Picket captain Mike Johnson, union employee Trent Schager, and several out-of-work union carpenters carried signs declaring that Sommerkal did not pay area standards. There was only one gate at the jobsite when picketing commenced. The picketers walked back and forth at that gate, an approximately 16 to 20 foot opening in the chain-link fence running along Mangels Boulevard. Two sections of the chain-link fence swung inward at a 90 degree angle to Mangels Boulevard in order to create the gate opening. The

⁷ The encroachment permit requires placement of construction barricades prior to commencement of work and to remain in place until construction is completed.

⁸ The easement was entered into between NorthBay Healthcare Group, the property owner, and NexCore Management, Inc., general partner of NorthBay Headquarters, LP, on behalf of NorthBay Healthcare Corporation as tenant of the headquarters building.

bility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

⁴ All dates are in 2007 unless otherwise specified.

⁵ The encroachment permit was issued in February 2007. Although the construction completion estimate was February 2008, the encroachment permit was issued only until expiration of Respondent's insurance, June 15, 2007. This was a standard City practice when the insurance would expire prior to the anticipated completion of the project. The City did this to ensure that it would receive an updated insurance policy. Upon receipt of such a policy, the City's practice was to extend the encroachment permit through the anticipated completion date.

⁶ All permits granted subject to 16.4.3 are subject to the right of way of any person entitled to use the public right of way for any purpose for which it may lawfully be used.

picketers walked along the curb between the gates inside the chain-link fence but staying on the public right-of-way portion of the project, i.e., the first 25 feet off of Mangels Boulevard.

On June 29, Respondent created a "dual gate" system at the jobsite designating Gate 1 for Sommerkal and other nonunion contractors

By letter of June 29, Respondent announced that Gate 1 was for the exclusive use of employees, subcontractors, and material suppliers of nonunion contractors including Sommerkal. Respondent announced establishment of Gate 2 a short distance from Gate 1 for the exclusive use of employees and materials suppliers of its union contractor. At the time the letter was faxed to the Union on June 29, picket captain Mike Johnson was unable to locate a second gate. However, as he was leaving for the day, he saw a gate company arrive and install a second gate. The following morning, there were signs at each of the two gates. Gate 1, the gate where the Union picketed on June 29, was designated for Sommerkal and other nonunion contractors. The new gate, designated Gate 2, was for use of the one union contractor, who was not yet on the job.

From June 29 until July 18, the Union picketed without incident at Gate 1

The Union's practice was to arrive at the jobsite around 6 a.m. to 7 a.m. and remain in or around their cars. When Sommerkal arrived at the jobsite, the Union began picketing at Gate 1. When trucks entered and exited the gate, the picketers stood against the opened gates. The record reflects no impact on ingress or egress of vehicles. Although the picketers were technically inside the chain-link fence, they remained on the public right-of-way portion of the jobsite while at Gate 1.

Prior to July 18, the Union picketed without incident in the easement area

On two occasions prior to July 18, some of the picketers went onto the easement area to follow Sommerkal work. For instance, when a concrete pour occurred, some of the Sommerkal trucks entered the jobsite from Business Center Drive. On another occasion, Sommerkal employees entered through an alternate opening from Business Center Drive. The pickets went to these locations and picketed while Sommerkal was present. After use of these alternate openings in the chain-link fence, Respondent sent follow-up letters re-establishing the "dual gate" system as set forth in the original June 29 letter.

On July 18, the picketers engaged in area standards picketing in the easement area

On July 18, around 10 a.m., the picketers saw a lumber delivery truck arrive in the easement area south of the jobsite. An opening in the chain-link fence between the jobsite and the easement area had been created in this area for a Sommerkal employee to unload the lumber with a fork lift. Trent Schager and another picketer went to this area and picketed for about 1 hour while the lumber was unloaded.

Around 11 a.m., a White Cap construction supply truck arrived in the easement area at another opening in the chain-link fence, this one near the jobsite construction trailer. The same Sommerkal employee reported to the White Cap truck with a forklift and began unloading the supplies. The pickets at the

lumber delivery easement area moved to the White Cap supply truck position in the easement area. About 1 hour later, the easement area picketers returned to Gate 1. At both of these locations in the easement area, the picketers were on private property.

On July 18, the City of Fairfield Police Department was summoned to the jobsite

Upon arriving at the jobsite on July 18, project manager James Clarke observed union picketers at Gate 1 as well as two picketers in the easement area where Sommerkal was unloading materials. Clarke was at the site to hold a weekly progress meeting at the construction trailer. As he began the progress meeting, the picketers in the easement area moved near the construction trailer.

Also attending the progress meeting was Ted Maestes, the designated project representative of NexCore Management, Inc., general partner of NorthBay Headquarters, LP. At the request of Maestes, Clarke asked the picketers in the easement area to return to Gate 1. When these picketers refused to leave the easement area, Clarke asked Johnson to have the picketers in the easement area return to Gate 1. Johnson declined, averring that the Union could picket wherever Sommerkal was present. At this point, Maestes contacted the City of Fairfield Police Department.

When the police arrived, they asked Johnson to remove the pickets from all locations except Gate 1. Johnson refused claiming a right to picket wherever Sommerkal was present. However, after Johnson spoke with the police, all picketers returned to Gate 1. At this point, Maestes and Clarke left Gate 1 and joined construction workers and others who were gathered for a barbecue to mark a construction milestone.

Although the police initially told the picketers to remain at Gate 1, eventually the police attempted, under threat of arrest, to relocate the picketers to a sidewalk at the intersection of Mangels Boulevard and Business Center Drive.

After Clarke and Maestes left Gate 1, the police requested that, for their own safety, the picketers relocate from Gate 1 to a sidewalk area at the intersection of Mangels Boulevard and Business Center Drive. The picketers continued to claim a right to picket at Gate 1, the designated Sommerkal gate. Finally, a police officer told picketing captain Johnson that if the picketers did not leave Gate 1, they would be arrested. At this point, Johnson directed all picketers to leave Gate 1. Johnson remained, however, with fellow picketer Trent Schager.

After Clarke agreed to sign a citizen's arrest form, the picketers were arrested at Gate 1 while on the public right-of-way

At the request of the police, Clarke agreed to sign a citizen's arrest form. Thereafter, Johnson and Schager, the two remaining picketers, were arrested at Gate 1 while on the public right-of-way. The picketers were taken to the police department, cited and released.

Johnson's citation indicates that he was arrested for violation of California Penal Code 602.1, refusal to leave private property, and for violation of a City ordinance which requires a permit for use of a bullhorn. Schager was arrested for violation

of California Penal Code 602.1, refusal to leave private property.

California Penal Code 602.1 provides in relevant part,

(a) Any person who intentionally interferes with any lawful business or occupation carried on by the owner or agent of a business establishment open to the public, by obstructing or intimidating those attempting to carry on business, or their customers, and who refuses to leave the premises of the business establishment after being requested to leave by the owner or the owner's agent, or by a peace officer acting at the request of the owner or owner's agent, is guilty of a misdemeanor, punishable by imprisonment in a county jail for up to 90 days, or by a fine of up to four hundred dollars (\$400), or by both that imprisonment and fine.

An exception to code 602.1 states as follows:

(c) This section shall not apply to any of the following persons:

1. Any person engaged in lawful labor union activities that are permitted to be carried out on the property by state or federal law.

At the time of the arrests, Respondent's encroachment permit was technically expired. The permit was extended at a later date

Respondent's original encroachment permit expired on June 15. There is no dispute that Respondent's encroachment permit had not been renewed as of July 18. At a later date, Respondent produced the appropriate proof of insurance renewal and the permit was extended to June 15, 2008.

The Solano County District Attorney did not prosecute Johnson

On August 16, Johnson appeared in court and was told that all charges against him had been dropped. He received a "Notice of Intent not to Prosecute" stating that no formal charges would be brought against him for the charge relating to violation of Section 602.1 of the Penal Code. The reason given on the notice was "Civil remedies should be sought." There is no evidence whether Schager was prosecuted or not. At the time of the hearing, Johnson did not know Schager's whereabouts.

CONCLUSIONS OF LAW

Johnson and Schager were arrested on public property at Gate 1

At the time of their arrest, Johnson and Schager were standing on the public right-of-way within Gate 1. They were therefore on public property at the time of their arrest. Although Schager was in the easement area earlier when the police were initially contacted, he left the easement area and returned to Gate 1 about one hour prior to being arrested.

Johnson and Schager were engaged in lawful Section 7 activity at the time of the arrest

At the time of their arrest, Johnson and Schager were engaged in lawful area standards picketing. Thus, the Union investigated wages and benefits paid by Sommerkal, determined that these wages and benefits did not meet the area standards paid to union-represented employees, asked Sommerkal to

refute this assertion if it was in error and, receiving no response, picketed with signs stating that Sommerkal did not pay area standards. Picketing for protection of area standards is clearly lawful Section 7 activity. See, e.g., *Corporate Interiors*, 340 NLRB 732, 745-747 (2003), citing *Bristol Farms*, 311 NLRB 437 (1993).

Respondent violated Section 8(a)(1) by causing the arrest of union representatives who were engaged in lawful Section 7 activity on public property.

Where public property is concerned, "[I]t is beyond question that an employer's exclusion of union representatives . . . violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 . . ."

Roger D. Hughes Drywall, 344 NLRB 413, 414-415 (2005), citing *Bristol Farms*, 311 NLRB 437 (1993); see also, *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984). Based upon this authority, I find that Respondent violated Section 8(a)(1) in causing the arrest of lawful area standards picketers Johnson and Schager. Although the complaint also alleges a threat of arrest, the only evidence of such a threat was a statement made by the police. There is no evidence that a representative of Respondent made such a threat. The allegation regarding a threat of arrest is dismissed.

Assuming, arguendo, that Schager was arrested for trespass on private property, Respondent has failed to demonstrate a sufficient property interest to foreclose violation of the Act

Counsel for Respondent argues that the picketers were arrested for trespass on private property. Of course, this argument could only apply to Schager. There is no dispute that Johnson remained on public property at all times. In any event, Respondent asserts that the appropriate analysis is set forth in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). *Lechmere* provides that if there are reasonable alternative means of communication between a union and its audience, exclusion of a nonemployee union organizer from private property does not violate Section 8(a)(1) of Act if the respondent had a right under applicable state law to prevent trespass.

Citing *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 25 Cal.3d 317, 158 Ca. Rptr. 370 (1979) and *Fashion Valley Mall, LLC v. NLRB*, 42 Ca. 4th 840, 69 Cal. Rptr. 3d 288 (2007), Respondent acknowledges that the California Penal Code exempts certain lawful union activity from prosecution for trespass. Respondent argues nevertheless that these cases are distinguishable because Respondent's jobsite, unlike a shopping center, was not open to the public. Respondent notes that no commercial, retail or public forum activities occurred on the jobsite. Thus, Respondent argues that the Union could effectively communicate its message without trespassing.

Finally, Respondent distinguishes In re *Catalano*, 29 Cal.3d 1, 171 Cal. Rptr. 667 (1981). In that case, the Supreme Court of California held that union representatives who entered a jobsite to conduct a safety inspection and prepare a steward's report were engaged in lawful union activity which did not warrant prosecution for trespass. Respondent notes that the Union herein was not on the jobsite for either a safety inspection or

preparation of a steward's report.

I reject Respondent's arguments. First, as I have found above, Johnson and Schager were arrested while on the public right-of-way. There is absolutely no evidence that Johnson entered upon the adjacent private property. Rather, Johnson was always present at the assigned picketing position, Gate 1, well within the public right-of-way. Assuming, however, for the sake of argument, that Schager was arrested for his presence on private property, I nevertheless conclude that his arrest would violate Section 8(a)(1).

*Lechmere*⁹ holds that nonemployee union organizers may not trespass on private property in order to organize employees unless there are no reasonable alternative means of communicating with the employees. *Lechmere* applies in the context of area standards picketing. *Leslie Homes, Inc.*, 316 NLRB 123, 127-129 (1995). Given my finding that the Union was engaged in lawful area standards picketing, pursuant to *Lechmere*, Respondent must demonstrate a private property interest pursuant to state law sufficient to warrant arrest for trespass. See *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993); *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), *enfd. sub nom. NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).

Johnson and Schager were cited with violation of California Penal Code 602.1 with the notation, "Refused to leave private property." However, this section of the penal code specifically exempts persons engaged in labor union activities which are permitted by the National Labor Relations Act. Because Johnson and Schager's actions fall within that exemption, Respondent has failed to demonstrate a property interest sufficient to warrant arrest for trespass on private property.

Further, I note that Respondent did not attempt to exert any public safety concerns by instituting designated area or peak traffic restrictions in order to avoid disruption of normal business operations. See, e.g., *Needletrades Employees (UNITE) v. Superior Court of Los Angeles County*, 65 Cal. Rptr. 2d 838 (Ca. Ct. App. 1997), cited with approval in *Glendale Associates, Ltd.*, 335 NLRB 27, 28 (2001), *enfd.* 347 F.3d 1145 (9th Cir. 2003).

Additionally, I reject Respondent's argument that *Sears* and *Fashion Valley* are distinguishable. Although Respondent is correct that both *Sears* and *Fashion Valley* arise in public shopping areas, the penal code exemption from prosecution for lawful union activity pertains to all trespass, not just trespass in public shopping areas. See, e.g., *In re Zerbe*, 388 P.2d 182 (S. Ct. Cal 1964) (union official who picketed on right-of-way of railroad serving employer's plant was engaged in lawful labor activities and not subject to conviction for willful trespass under California Penal Code).

Finally, I reject as misplaced Respondent's argument that because its jobsite was not open to the public there were reasonable alternative means for communicating outside the fence. The penal code exemption controls whether Respondent may demonstrate a sufficient property interest to warrant arrest for trespass. Respondent's argument—that the Union could effectively communicate its message without coming inside the fenced jobsite—presumes demonstration of a sufficient prop-

erty interest to warrant application of *Lechmere*. The penal code exemption precludes such a showing. Therefore, *Lechmere*'s reasonable alternative means analysis is not reached.

Although it may be possible to analyze this case pursuant to the right to seek redress of grievances, I decline General Counsel's invitation to do so.

General Counsel asserts that *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), reaffirming the holding in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), provides the framework for analysis. Thus, counsel asserts that the arrest violated Section 8(a)(1) of the Act because it was objectively baseless (because the district attorney did not prosecute) as well as retaliatory. Counsel notes that retaliation is evidenced by Clarke's admission that the Union had a right to picket at Gate 1, Clarke's testimony that the only reason he signed the citizen's arrest form was because the pickets showed disrespect for the police by refusing to move to safer locations at the request of the police, and Clarke's admission that, to be quite honest, he would rather not have any picketers at all. Counsel for Charging Party agrees with this rationale.

Because I have found that Johnson and Schager were arrested on public property while engaged in lawful area standards picketing, it is not necessary to address these issues.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with Board authority, I recommend that Respondent be ordered to make the Union whole with respect to the litigation costs arising from Johnson and Schager's arrest and that Respondent be ordered to notify the appropriate law enforcement and court authorities of the illegality of the arrest and to seek the expungement of associated records. *Roger D. Hughes Drywall*, 344 NLRB 413 (2005) and cases cited therein as follows: *Schear's Food Center*, 318 NLRB 261, 267 (1995); *K Mart Corp.*, 313 NLRB 50, 58 (1993); *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), *aff'd.* 568 F.2d 1 (6th Cir. 1977). See also *Petrochem Insulation, Inc.*, 240 F.3d 26, 35 (D.C. Cir. 2001).

ORDER

Respondent Hearn Construction, Vacaville, California, its officers, agents, successors, and assigns, shall cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act by causing the arrest of picketers lawfully engaged in area standards picketing as employees or representatives of Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act:

(a) Notify the Solano County District Attorney's Office and appropriate court authorities in writing, with a copy to the Union, that the Board has determined that Johnson and Schager's

⁹ *Lechmere, Inc. v. NLRB*, *supra*, 502 U.S. at 535.

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arrest on July 18, 2007, violated the Act; request in writing, with a copy to the Union, that the District Attorney's Office and the court remove any and all records of that unlawful arrest; and make Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest.

(b) Within 14 days after service by the Region, post at its Vacaville, California, office, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, 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 employees are customarily posted.

(c) Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2007.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it so chooses, at all places where it customarily posts notices to its members and employees.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 10, 2009

¹⁰ 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
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 with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act by causing the arrest of picketers lawfully engaged in area standards picketing as employees or representatives of Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America.

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

WE WILL notify the Solano County District Attorney's Office and appropriate court authorities in writing, with a copy to the Union, that the Board has determined that Johnson's and Schager's arrests on July 18, 2007, violated the Act.

WE WILL request in writing, with a copy to the Union, that the Solano County District Attorney's Office and the court remove any and all records of that unlawful arrest.

WE WILL make Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrests.

HEARN CONSTRUCTION