Small v. Operative Plasterers' and Cement Masons' International Association Local 200

2009 | Cited 0 times | Ninth Circuit | March 17, 2009

NOT FOR PUBLICATION

MEMORANDUM[1]

Argued and Submitted February 4, 2009 -- Pasadena, California.

Before: PREGERSON, GRABER, and WARDLAW, Circuit Judges.

Local 200 appeals a preliminary injunction entered pursuant to 29 U.S.C. § 160(l), enjoining Local 200 from pursuing certain California state lawsuits pending the National Labor Relations Board's final adjudication as to whether the lawsuits constitute an unfair labor practice in violation of 29 U.S.C. § 158(b)(4)(ii)(D). The Regional Director cross-appeals the district court's subsequent modification of the injunction. We have jurisdiction, 28 U.S.C. § 1291, and we affirm the grant of injunctive relief, but reverse on the cross-appeal, reinstating the full scope of the original injunction.

1. The district court did not abuse its discretion in granting the injunction because the Regional Director demonstrated a likelihood of success on the merits; the possibility of irreparable injury; and that the balance of hardships and the public interest would be advanced by granting the preliminary relief. See Overstreet v. United Bhd. of Carpenters of Am., Local Union No. 1506, 409 F.3d 1199, 1207 (9th Cir. 2005). A state court "suit that has an objective that is illegal under federal law" may be enjoined as an unfair labor practice. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 737 n.5 (1983).

A lawsuit that has as its objective "an improper desire to circumvent the section 10(k) determination" is unlawful because it constitutes the "union's attempt to obtain payment for work to which it is not entitled[, and] would, if successful, completely undermine the section 10(k) work assignment." Int'l Longshoremen's Union, Local 32 v. Pac. Maritime Ass'n, 773 F.2d 1012, 1015 (9th Cir. 1985). The Board, in its second relevant section 10(k) determination, explicitly assigned disputed work for all current and future public works projects performed by SDI in twelve California counties to the Carpenters. See Sw. Reg'l Council of Carpenters (Standard Drywall), 348 N.L.R.B. 1250 (2006). Because any favorable resolution of the state suits would directly conflict with the Board's section 10(k) determination, Local 200 "could not obtain the relief it sought regardless of the F.2d 230, 236 (3d Cir. 1992). Thus, both state court lawsuits likely have the object of "coercing" SDI to pay Local 200 for work, or assigning Local 200 employees to work that has already been assigned to the Carpenters by the Board, in violation of 29 U.S.C. § 158(b)(4)(ii)(D). Therefore, the Director has established a likelihood of success on the merits.

Because likelihood of success was demonstrated, the district court correctly "presume[d] irreparable injury to the Board." Overstreet, 409 F.3d at 1207 (internal quotation marks omitted). The balance of hardships and the public interest also weigh in favor of granting the injunction. Weighed against the likelihood that Local 200's lawsuits will be enjoined for a substantial period of time, until the Board's determination on the merits,[2] is the possibility that the very cost of defending the lawsuits may force SDI to reassign Carpenters' work to Local 200, thereby engendering a disruption of industrial peace, causing "obstructions to the free flow of commerce," Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc), and "threaten[ing a] danger of harm to the public," Retail Clerks Union, Local 137 v. Food Employers Council, Inc., 351 F.2d 525, 531 (9th Cir. 1965). We affirm the entry of the injunction appealed in no. 08-56668.

2. The district court lacked subject matter jurisdiction to modify the injunction once an appeal was taken. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam). Though the court is allowed to "modify . . . an injunction on . . . terms that secure the opposing party's rights," Fed. R. Civ. P. 62(c), the court only "retains jurisdiction during the pendency of an appeal to act to preserve the status quo," Natural Res. Defense Council v. Sw. Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001). The district court deleted paragraph 1(c), which prohibited "in any manner or by any means, threatening, coercing, or restraining [SDI], where an object thereof is to force or require [SDI] to assign plastering work" to Local 200. This modification altered the status quo by failing to prevent Local 200 from proceeding with other coercive measures designed to undermine the Board's section 10(k) determination pending final adjudication. We reverse the modification order deleting paragraph 1(c) in appeal no. 08-56942, and reinstate the injunction as originally granted.

The order appealed in no. 08-56668 is AFFIRMED.

The order appealed in no. 08-56942 is REVERSED.

1. This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2. We grant Local 200's motion to take judicial notice of the Board's 2006 Annual Report under Federal Rule of Evidence 201(b)(2). See Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1403 (9th Cir. 1989), overruled on other grounds as recognized in P.B. v. Koch, 96 F.3d 1298, 1303 (9th Cir. 1996).