

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTH AMERICAN ROOFING	:	
& SHEET METAL CO., INC. ET AL.	:	CIVIL ACTION
	:	
v.	:	NO. 99-CV-2050
	:	
BUILDING AND CONSTRUCTION	:	
TRADES COUNCIL OF PHILADELPHIA	:	
AND VICINITY, AFL-CIO, ET AL.	:	

SURRICK, J.

JANUARY 10, 2005

MEMORANDUM & ORDER

Presently before the Court is Plaintiffs' Motion in Limine Seeking to Exclude the NLRB Determinations (Doc. No. 128). For the following reasons, Plaintiffs' Motion will be granted.

I. BACKGROUND

This action involves allegations of unfair labor practices under Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, and racial discrimination under 42 U.S.C. §§ 1981, 1985(3), and 1986 by Defendants Roofers Local 30 ("Local 30"), Sheet Metal Workers' International Association Local 19, Local Union 98, International Brotherhood of Electrical Workers, Metropolitan Regional Council of United Brotherhood of Carpenters and Joiners of America, Steamfitters Local Union 420, the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO ("BCTC"), and various officers of these unions, against Plaintiffs North American Roofing & Sheet Metal Co., Inc. ("North American"), ANVI & Associates, Inc. ("ANVI"), and its owners and employees. In 1998, North American, a non-union roofer, was awarded a contract in the amount of \$885,000 to perform roofing work in the rebuilding of Southwark Plaza, a public housing project situated in South Philadelphia. (Am.

Compl. ¶¶ 43, 47.) On February 17, 1999, several months after North American and a non-union subcontractor, ANVI, had begun work at Southwark Plaza, members of Local 30 began picketing the “reserved gate” that had been set up for the employees of North American and ANVI. (*Id.* ¶ 87.) Later that morning, all of the union members at the construction site staged a work stoppage and walkout. (*Id.* ¶¶ 90-92.) Plaintiffs contend that the work stoppage and walkout was intended to force the general contractor, Shoemaker/Dale J.V., to cease doing business with North American and ANVI. (*Id.* ¶¶ 119-39.) On March 5, 1999, Shoemaker/Dale J.V. suspended North American’s contract and directed the non-union employees to vacate the premises. (*Id.* ¶ 105.) Upon the departure of North American and ANVI from the work site, all union members returned to the job and resumed work. (*Id.* ¶ 107.)

In response, Plaintiffs filed a charge with the National Labor and Relations Board (“NLRB”) alleging that Defendants had engaged in an illegal “secondary boycott” under section 8(b)(4) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 158(b)(4). (Doc. No. 128 at 1; Doc. No. 101 Ex. 13.) The NLRB issued two letters of determination on March 30, 1999, and June 16, 1999, stating that an investigation had been conducted and the NLRB had determined that no violation of section 8(b)(4) had occurred. (Doc. No. 103 Ex. 14 at 1; *id.* Ex. 16 at 1.) Plaintiffs seek to exclude evidence of the NLRB’s determination letters under Federal Rule of Evidence 403 on the ground that they would confuse or mislead the jury. (Doc. No. 103.)

II. DISCUSSION

In determining whether to admit evidence, a court must make the threshold determination that the proffered evidence is relevant. Relevant evidence is defined as evidence that has a “tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Evidence that is not relevant is not admissible. Fed. R. Evid. 402. Relevant evidence may also be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. In making a Rule 403 determination, we must “balance the genuine need for the challenged evidence against the risk that the information will confuse the jury and delay trial.” *In re Paoli R.R. Yard PCB Litigation*, 113 F.3d 444, 453 (3d Cir. 1997); *see also* Fed. R. Evid. 403 advisory committee’s note (noting that Rule 403 objections “call for balancing the probative value of and need for the evidence against the harm likely to result from its admission). “However, there is a strong presumption that relevant evidence should be admitted, and thus for exclusion under Rule 403 to be justified, the probative value must be ‘substantially outweighed’ by the problems in admitting it.” *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343-44 (3d Cir. 2002).

It is within discretion of the court to admit or deny evidence of an administrative agency’s findings of fact and determinations on the merits. *See, e.g., Walton v. Eaton Corp.*, 563 F.2d 66 (3d Cir. 1977) (upholding a district court’s refusal to admit an EEOC determination). The Third Circuit has refused to adopt a *per se* rule for admission of administrative agency determinations, holding instead that evidentiary decisions must be made on a case-by-case basis, balancing “the maximum probative force for the offered evidence” with the “likely prejudicial impact” of the negative factors listed in Rule 403. *Coleman*, 306 F.3d at 1344.

Here, we conclude that the probative value of the NLRB determination letters is substantially outweighed by the danger of unfair prejudice and confusion that would result from

their admission. The first determination letter, the body of which contains a mere four paragraphs of text, states that NLRB has “carefully investigated and considered” Plaintiffs’ charges and determined that they “lack[] merit.” (Doc. No. 101 Ex. 14 at 1.) In its brief analysis, the letter states that:

There was insufficient evidence to establish that picketing engaged in by Roofers Local 30 at the Southwark housing project in Philadelphia, Pennsylvania, violated Section 8(b)(4)(B) of the Act. The investigation disclosed that Local 30 engaged in lawful primary picketing against North American Roofing and Sheet Metal Co., Inc. exclusively at the gate reserved for North American, its suppliers and employees. There was no evidence that Local 30 otherwise unlawfully induced employees of neutral employers at the job site. It is well established that it is the object of the picketing, not its effect[,] which is the controlling factor in determining if secondary or primary activity has occurred. The Board has held that picketing in compliance with its *Moore Dry Dock* standard is presumed to be lawful, and that any incidental impact of such picketing upon the employees of neutral employers at a common situs will not render the picketing unlawful. Finally, there was no evidence that the Building and Construction Trades Council of Philadelphia and Vicinity, violated the Act in any manner alleged in the charge.

(*Id.* (citations omitted).)

The second determination letter was issued on June 16, 1999, in response to Plaintiffs’ request for reconsideration. (*Id.* Ex. 16.) In that letter, the NLRB rejected Plaintiffs’ argument that an inference of illegal coordination by Local 30 and the BCTC should be drawn from the fact that all union employees walked off the Southwark Plaza construction site on February 17, 1999. The second letter, however, relies primarily on the prior decision to support its claim that there was no evidence of an illegal secondary boycott.¹ (*Id.* at 1-2.)

¹ The only supplemental evidence that was considered by the NLRB, a clause in the BCTC’s Constitution/By-Laws that allegedly demonstrated that the union employees’ walkout was required by the BCTC’s member unions, was determined to provide no support for Plaintiffs’ claims. (*Id.* at 1.)

For several reasons, we conclude that the determination letters have little probative value. First, the NLRB's letter does not describe how it conducted its "careful[] investigat[ion]," nor does it relate any facts that the investigation may have revealed. (Doc. No. 101 Ex. 14.) Rather, it points solely to the *absence* of facts regarding Local 30 and the BCTC's activities in concluding that the picketing was not unlawful. Absent any discussion of the method, scope, or thoroughness of the investigation conducted by the NLRB, however, the Board's determination that there were no facts to support North American's claims has little probative value. *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 587 (6th Cir. 1994) (excluding an NLRB decision letter because it failed to provide the factual basis for the NLRB's conclusion that insufficient evidence existed to support plaintiff's claims). Second, we note that these determination occurred on March 19, 1999, and June 16, 1999, the latter of which occurred only shortly after Plaintiffs' Complaint was filed in this Court. Obviously, the NLRB's decision does not have the benefit of any evidence that Plaintiffs may have uncovered during discovery regarding Local 30 and/or the BCTC's alleged involvement in the walkout or the alleged illegal object of the picketing. Under the circumstances, we conclude that the NLRB determination letters have little if any probative value for the factfinder. *See Black*, 15 F.3d 587 (concluding that the NLRB's decision letter was "probative of almost nothing").

On the other side of the scale, it is apparent that there is a significant likelihood that Plaintiffs would suffer unfair prejudice if the NLRB determination letters were admitted. There is a strong possibility that the jury would improperly defer to the NLRB's conclusion that Defendants Local 30 and BCTC did not engage in an unfair labor practice, substituting the agency's judgment for its own. As the Eleventh Circuit has noted,

The admission of an [administrative agency's] report, in certain circumstances, may be much more likely to present the danger of creating unfair prejudice in the minds of the jury than in the mind of the trial judge, who is well aware of the limits and vagaries of administrative determinations and better able to assign the report appropriate weight and no more.

Barfield v. Orange County, 911 F.2d 644, 651 (11th Cir. 1990); *see also Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1050 (9th Cir. 1999) (noting that “a jury might find it difficult to evaluate independently evidence of discrimination after being informed of the investigating agency’s final results”); *cf.* Thomas P. Murphy, *Disabilities Discrimination Under the Americans With Disabilities Act*, 36 Cath. Law. 13, 32 (1995) (“If an employee is successful in obtaining a ‘probable cause’ determination [from the EEOC], this evidence can be very compelling to a jury, despite the fact that the employee must still prove a valid case.”). In a similar situation, the Sixth Circuit upheld the trial court’s exclusion of an NLRB decision letter on these grounds. *Black*, 15 F.3d at 573. The Sixth Circuit explained that if the decision letter was admitted, “the jury would be quite likely to assign greater value to the [NLRB’s] decision than it is worth, given that is only the product of an administrative investigation, and not of an adjudicatory procedure.” *Id.* at 587.

The Sixth Circuit’s decision is persuasive. There is a significant likelihood that, in considering the NLRB determination letters, the jury would defer to the NLRB’s findings and legal conclusions.² The NLRB stated that it “carefully investigated and considered” Plaintiffs’ claims of an illegal secondary boycott, and found that they lacked evidentiary support. (Doc. No. 101 at 1.) A jury may well give improper weight to these findings. In addition, given the NLRB’s position in the field of labor law, an area of significant complexity, the admission of its

² In fact, in their proposed jury instructions, Defendants seek to inform the jury that the NLRB’s decision should be given “great weight” in their deliberations. (Doc. No. 119, Defendants’ Proposed Charge No. 14.).

report may improperly encourage the jury to simply adopt the NLRB's determination as its own. We are satisfied that the jury is perfectly capable of weighing the evidence and reaching a fair decision on the issues raised by the Section 303 claim without the benefit of the NLRB's conclusions.³

III. CONCLUSION

In light of the very limited probative value of the NLRB determination letters and the significant likelihood that the letters would unfairly prejudice Plaintiffs and confuse and mislead the jury, we conclude that the NLRB determination letters must be excluded.

An appropriate Order follows.

³ One must also be concerned that the NLRB's conclusions in the determination letters might also impact the jury's consideration of the non-section 303 claims.

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ORDER

AND NOW, this 10th day of January, 2005, upon consideration of Plaintiffs' Motion in Limine Seeking to Exclude the NLRB Determinations (Doc. No. 128), and the response thereto, it is ORDERED that the Plaintiff's Motion is GRANTED. The NLRB determination letters are excluded from evidence at trial.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge