CONSTRUCTION RISK MANAGEMENT REPORTER

ERNSTROM & DRESTE LLP

ContrACT

SPRING 2011 ISSUE 8

Prepare to Be "Bannered"

BY MATTHEW D. BROWN

Unions are increasingly targeting non-union contractors across the country through a letter writing campaign directed to project owners considering doing business with an open shop contractor. The unions typically assert that they have a "labor dispute" with the non-union contractor, alleging that the contractor "does not meet area labor standards" and that hiring the contractor would contribute "to the undermining of area labor standards." Moreover, the unions threaten to begin an aggressive and highly visible banner display, distribution of hand bills and other activities directed at the owner, rather than the contractor, if the owner does not use its "managerial discretion" and elect not to use the non-union contractor.

These tactics have gained momentum from a decision last year by the National Labor Relations Board. In *United Brotherhood of Carpenters and Joiners of America*, 335 NLRB 159 ("Carpenters"), the Board held that a union does not violate the National Labor Relations Act

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Runner v. New York Stock Exchange Revisited:

Courts Struggle to Apply Court of Appeals' "Force of Gravity" Test for Section 240 Liability

BY JOHN W. DRESTE

As we reported last year, the New York Court of Appeals' *Runner v. New York Stock Exchange* decision established the new "force of gravity" test for determining whether or not Labor Law §240 liability may apply to injuries sustained as a result of elevation risks at construction job sites.[1] Readers may recall that *Runner* concerned a worker who lost several fingers while using a makeshift pulley to lower a heavy reel of wire down a small stairway separating two levels of split-level hallway. We predicted that the *Runner* decision may confuse lower courts, many of which had begun to limit the applicability of Section 240, especially where injuries were merely the result of the "ordinary dangers" inherent at a construction site. Now that more than a year has passed since the *Runner* decision was rendered, we thought it would be helpful to examine how various courts have reacted in examining the applicability of Section 240. In this first part (see the next edition of ContrACT for Part 2), we examine selected cases that have sought to distinguish *Runner* in order to dismiss Section 240 claims.

Cases Distinguishing Runner

***Lombardo v. Park Tower Management, Ltd,* 76 A.D.3d 497 (1st Dept. 2010):** The Appellate Division ruled that Section 240 did not apply when a worker fell after the middle step on a three-stair staircase broke while the worker was accessing a "pit" containing a refrigeration unit on which the worker was performing repairs. This court held that the middle step was not of sufficient height to trigger Section 240, in part because the harm was "caused by the breaking of a step on a stairway that had been in place for many years and not by a gravitational force." A strong dissenting opinion stated that the Court of Appeals in *Runner* had instructed that courts have historically read Section 240 too narrowly and that the harm to the plaintiff was clearly "the direct consequence of the application of gravity to his body stepping on a weakened stair." It is unclear whether or not the Court majority would have agreed, if this worker had been carrying heavy tools or equipment which could have been argued to have caused the stair to collapse.

***Gasquez v. State,* 15 N.Y. 3d 869 (2010):** The Court of Appeals itself revisited *Runner* in this case, finding that injuries to a worker's hand did not fall under the protections of Section 240, because the injuries occurred while this worker ascended on a mechanized "spider scaffold." The Plaintiff's hand was caught between the scaffold and a leg of the bridge, because the scaffold continued to move under the impetus of one of its motors, but the court considered this not to be the direct consequence of the application of the

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IN THIS ISSUE

When in Doubt, Don't Throw it Out

BY THOMAS K. O'GARA

Courts in New York, and around the country, have levied stiff penalties against parties who intentionally or negligently destroy documents or property when litigation is pending or imminent. Ernstrom & Dreste, LLP recently defended the contractor sued for property damaged after it allegedly struck the underground wires/cables of a utility company. The utility company alleged that the damage to its underground facilities was so severe that the wires/cables needed to be completely replaced. But after replacing the underground facilities, the utility company disposed of the allegedly damaged material without giving the contractor, or its representative, an opportunity to inspect the damage.

Approximately one year after the lawsuit was commenced, it was learned that the utility company no longer was in possession of the damaged and replaced facilities. This office brought a motion seeking to dismiss the utility company's claims based upon the prejudice caused by contractor's inability to inspect the destroyed materials.

Ernstrom & Dreste, LLP argued that without an opportunity to inspect the damaged wires/cables, the contractor had no ability to determine the condition of the wires/cables at the time of the accident and, if the facilities were actually damaged, the extent of any damage. Further, without an examination of the facilities, the contractor argued that it was impossible to assess the reasonableness of the damages incurred by the utility company.

The utility company offered no explanation for the destruction of the wires/cables, but argued that an inspection was unnecessary because any informa-

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force of gravity to an object or person, apparently simply because the moving scaffold was going up.

***Steinman v. Morton International, Inc.*, 2010 WL 4703487 (W.D. N.Y. 2010):** The United States District Court, Western District of New York, found Section 240 to be inapplicable where a portion of an existing brick wall, that was being demolished by the plaintiff's employer, collapsed and landed on plaintiff's leg. The court found that the New York Court of Appeals has made clear that the protection afforded by Section 240 is limited to liability for injuries arising from "special hazards" related to the effects of gravity where enumerated protective devices are required, either because the worksite itself is elevated, or because of the position below the level where materials or loads are hoisted or secured. This court refused to apply *Runner*, because the wall was stationary and was on the same level as the worksite, making the plaintiff's Section 240 arguments unavailing.

***Sereno v. Hong Kong Chinese Restaurant*, 79 A.D.3d 1414 (3rd Dept. 2010):** The Appellate Division upheld dismissal of the Section 240 claim of a plaintiff who sustained an eye injury after he dropped a pressurized bottle that released or sprayed a cleaning chemical into his eye upon hitting the floor. The court ruled this accident to be among the usual and ordinary dangers of a workplace, rather than one of the extraordinary risks envisioned by Section 240. Because plaintiff had taken hold of the bottle and it was not being lowered when it fell to the ground, there was no elevation differential between the falling object and plaintiff. Further, there was no evidence that the bottle fell because of any absence of a safety device required under the statute. Lastly, the bottle was not in the process of being hoisted or secured and the plaintiff was not injured as a result of being struck by the falling bottle.

***Makarius v. Port Authority of New York and New Jersey*, 76 A.D.3d 805 (1st Dept. 2010):** The Appellate Division, First Department, dismissed a Section 240 cause of action where a transformer fell off a wall, striking the plaintiff in the head. The plaintiff was standing on the ground holding a ladder on which a coworker stood, but the work did not relate to the transformer itself. In dismissing the Section 240 claim, the court noted that the transformer was six to seven feet off the ground and fell only a short distance before reaching the head of the 5' 8" tall plaintiff. This court considered *Runner* inapplicable, because in *Runner* the single dispositive question was whether injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Without getting into the issue of whether or not a pre-existing permanent object that falls would be subject to Section 240, this court instead held that there was no significant height differential between the work being performed and the object that fell. One concurring opinion noted that the Court of Appeals in *Runner* noted that experts testified that a pulley or hoist should have been used to move the reel safely down the stairs, apparently feeling that no safety device was indicated in this case to prevent the apparently secured transformer from falling off the wall.

Thus, some courts remain open to defenses that had been developing, prior to *Runner*, that function to limit boundless expansion of Section 240 liability. In the next edition, we will review how other courts are using *Runner* to confirm the application of Section 240. At present, there does not seem to be any clear delineation of exactly where the liability line is drawn, and each case must be examined on its own facts. E&D

1 Runner v. New York Stock Exchange, 13 N.Y.3d 599 (2009).

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(the "Act") when it displays stationary banners at the business of a secondary employer, that is a business not directly involved in a labor dispute, but that has ties to the employer, i.e. contractor, that is involved. In *Carpenters* the union bannering was targeted at the owner that hired the contractors rather than the contractors.

A secondary boycott appeals to the customers of a neutral employer in the hope that the neutral employer will then pressure the primary employer (the entity with which the union claims to have a dispute) to acquiesce to the union. Under the Act, it is an unfair labor practice for a union to coerce or restrain neutral employers for this purpose. Picketing directed at a neutral employer violates the Act because of the inherently coercive, intimidating nature of picketing. However, cases interpreting the Act have carved out an exception to the secondary boycott provisions for handbilling, which is deemed peaceful persuasion and not coercion. The key question for the Board in the *Carpenters* case was whether the display of stationary banners on public rights-of-way was closer to picketing or handbilling. The Board in *Carpenters* ruled that the union's secondary boycott did not constitute an unfair labor practice when done solely with leafleting and banners in the manner described in the decision.

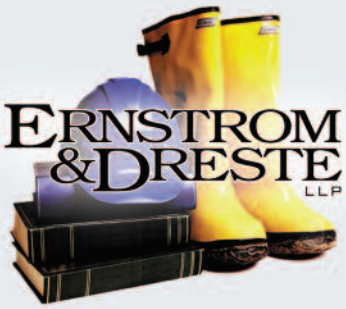
In *Carpenters* the union placed banners, 16 feet long and 4 feet high, on sidewalks outside the secondary employers' businesses 15 to 1,050 feet from the nearest entrance to the secondary employers' establishments. The banners announced a "labor dispute" and sought to elicit "shame on" the secondary employers or persuade customers not to patronize them. The number of union representatives accompanying the banner was limited to the number needed to hold it up with staggered breaks. They did not chant, yell, march or engage in any similar conduct. Instead, the banners were held parallel to the sidewalk at the edge of the street so they did not block the sidewalks. In addition, the union representatives offered flyers to members of the public explaining that the union's underlying complaint was with the primary employers, who were contractors.

A majority of the Board ruled that the Act does not prohibit the "nonconfrontational display of stationary banners" relying on the fact that the signs were stationary and positioned a sufficient distance from business entrances. The Board also emphasized that for bannering to become unlawful picketing there had to be some verbal or physical confrontation. The Board determined that holding a stationary banner is not proscribed picketing and it found that the banner displays in *Carpenters* were not disruptive or otherwise coercive. Two Board members dissented, asserting that the Act and Board precedent prohibit bannering as a means of promoting a secondary boycott and that the bannering threatened, coerced or restrained the neutral employers.

Since *Carpenters* the Board has issued similar decisions. These decisions are subject to appeal, so it remains to be seen whether bannering of a neutral employer will continue to be a permissible labor practice. If and until these decisions are overturned or modified they remain the current state of the law regarding these union practices.

What can a targeted contractor do?

1. If faced with union protest activity, act with caution in communicating and dealing with the union so as to avoid being charged with an unfair labor practice under the Act.
2. Work closely with legal counsel in responding to such union activity and develop a prepared statement in the event of press and public inquiries.
3. Educate management personnel as to your company's rights and obligations under the Act to avoid taking any actions that could result in the filing of unfair labor practice charges by the union.
4. Send a letter to the owner substantiating why the union's claims are wrong. For instance, is the average salary of your employees at the site higher than the prevailing wage for the area?
5. Demand from the union documentation to support its labor dispute allegations (and copy the owner).
6. Encourage the owner to send letters to its customers and shareholders explaining the dispute and the owner's reason for using your company (cost, efficiency, quality).
7. With the permission of the project owner, distribute leaflets or display banners at the properties explaining this union tactic.
8. Obtain and keep copies of union leaflets and document the banners and other activity with photos or video.
9. If the "bannering" evolves into picketing or otherwise becomes coercive, an unfair labor practice charge should be filed against the union. E&D



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tion the contractor was seeking about the damaged facilities or replacement process could be obtained through documents or the testimony of other employees. With this information, the contractor would suffer no prejudice from its inability to inspect the subject facilities.

In dismissing the utility company's claims, the court determined that "[t]he integrity of our judicial system depends on the ability of litigants to locate and identify relevant proof without fear that the truth-seeking process will be thwarted by spoliation of evidence," and that the allegedly damaged facilities were the "most eloquent impartial witness" to what actually happened and the damages sought.

While this decision is being appealed, it does follow the national trend of courts imposing penalties on those who destroy documents or other evidence relevant to a lawsuit. One federal court in Maryland, recently determined that a party's spoliation of documents not only warranted partial summary judgment for the other party, but civil contempt resulting in jail time for the spoliators! *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010). The court later substituted jail time with the obligation to pay the other party's attorneys' fees totaling $337,796.37.

The message of these court decisions is clear: preserve **all** potentially relevant evidence, physical and electronic, whether litigation is pending, anticipated or even just being considered.

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