

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: October 23, 2008

TO : Alan Reichard, Regional Director  
Region 32

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Carpenters Local Union No. 405  
(South Bay Construction) 560-2575-6770  
Case 32-CC-1559 560-7540-4080-2500

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(ii)(B) when, among other things, it bannered both the primary employer away from primary construction gates and a neutral employer at its stores while using cameras and megaphones. We conclude that the Region should proceed as directed below.

### FACTS

Charging Party South Bay Construction is a general contractor engaged in the remodeling of a number of buildings for Apple, Inc. in Cupertino, California. South Bay had been signatory to a series of collective bargaining agreements with the Carpenters for approximately 10 years. The last of these agreements, subsequently extended, expired on July 31, 2008,<sup>1</sup> and the parties have not agreed upon a successor.

In anticipation of labor problems, South Bay established reserved gate systems at three Apple building sites, reserving a series of primary gates for use by South Bay and related employers and a series of neutral gates for employees of other contractors. At around the same time, Respondent Carpenters Local 405 erected three large, freestanding banners at the intersection of De Anza Boulevard and Mariani Avenue near and/or adjacent to the construction sites. It erected a fourth banner at the corner of Mariani Avenue and Infinite Loop, about 60 feet from the edge of the Apple headquarters complex. The banners state that South Bay terminated its agreement with the Carpenters, and that the company hurts workers, families and the communities. The De Anza/Mariani Avenue banners are from approximately 75 yards to about 300 yards from the gates reserved for primary South Bay employees at

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<sup>1</sup> All dates are in 2008 unless specified otherwise.

the various buildings where construction work is being done. The Union placed a small "coffin" next to one of these banners with the name South Bay written on it.

Union agents also handbilled the public while standing next to the banners. One handbill (the "Apple handbill") stated that Apple had hired South Bay and that "they" have terminated "their" agreement with the Carpenters Union. A second handbill stated that South Bay has terminated their agreement with the Carpenters Union. Some agents on some dates also used amplified megaphones, chanting loud, and sometimes obscene, phrases naming the primary Employer (e.g., "South Bay is hurting our families"). For instance, for about one hour on August 1, Union agents used the megaphone approximately every 5 minutes, for about 30 seconds at a time. The Union also stationed handbillers at three locations in the Apple headquarters complex (at the main pedestrian entrance, in front of the Apple employee store and in front of the Apple employee underground garage). The Union did not erect a banner at these locations, and Union agents did not block access to or from Apple property. On some days, handbilling at the main pedestrian entrance was recorded for about ten minutes per day by a Union agent with a video camera standing about 30 yards away in a restaurant parking lot. On some days, a Union agent also used a megaphone at these three locations to occasionally yell anti-South Bay slogans. Additionally, for a few hours on two days a Union agent stationed at the main pedestrian entrance beat a drum periodically to make more noise.

On August 22, the Union replaced the South Bay banner that had been at the intersection of Mariani Avenue and Infinite Loop on Apple property with a new banner that read: "CONSUMER ALERT: Apple Inc. Hires Rats!," with "LABOR DISPUTE" in the corners. This new banner (the "Apple banner") remained at this location until September 10, when the Union reerected the banner directed only against South Bay (alongside a small, two-foot-tall model of a rat).<sup>2</sup>

In addition to the activities near Apple headquarters, the Union also engaged in a campaign directed against Apple at eight of its retail stores throughout the greater San Francisco Bay Area. The Union has erected banners at five of these eight retail stores on varying, and not necessarily consecutive, days. The Union has only used Apple banners targeting Apple as a "rat employer," without

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<sup>2</sup> The Union also erected a freestanding banner naming South Bay in front of South Bay's headquarters in Los Gatos, California.

mentioning South Bay, and it has always been accompanied by the distribution of Apple handbills (described above) to store customers and passers-by. On some days, Union handbillers wore white lab coats, while on other days agents wore costumes depicting an Apple iPhone and, on one occasion, a rat.

In addition, during its demonstrations at some stores on some days, the Union has combined bannering and handbilling with other conduct. Union agents filmed proceedings with a still or video camera (sometimes mounted on a tripod) pointed at the store entrance or store front at a variety of locations on a variety of dates.<sup>3</sup> The cameras apparently recorded the activity of Union handbillers when they engaged passers-by, Apple store employees and their customers as they entered, exited, or walked past the store. On some dates at some stores, Union agents also used a megaphone to chant pro-Union or anti-Apple slogans while it bannered and handbilled the public.<sup>4</sup> These agents did not use their megaphones constantly, but rather for a few minutes a few times per hour. In this way, agents loudly stated such things as "Apple hires rats" or "Shame on you Apple," and in one instance, an agent read the entire Union handbill through his megaphone. The noise of the megaphones was loud enough to be heard throughout the stores, including, at the Stanford University location, in an enclosed interior office located behind a steel door about 50 feet inside the entrance. At the Palo Alto location, Union agents turned their megaphones toward the front of the store, resulting in a noise level inside the store audible up to 100 feet from the entrance. At the end of the day, a Union agent told the manager of the Palo Alto store that they would be back the next day to "make some noise."

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<sup>3</sup> The Union used a video camera at the San Francisco store on August 11, 20 and 22; Stanford University on August 19 and 20; Los Gatos on August 7 and 8; and Palo Alto on August 7, 8, 9, 12, 13, 14, 18, 19 and 20. Union agents also took still pictures of the campaign at the Stanford University store on August 19 and 20. In addition, at the Stonestown store, Union agents videotaped proceedings on August 13, 19 and 21 and used a still camera on August 7. The Union did not erect a banner at Stonestown.

<sup>4</sup> Union agents used a megaphone at a store in San Francisco on August 11; Stanford University on August 19 and 20; Los Gatos on August 8; Palo Alto on August 8, 9, 12, 13, 14, 18, 19 and 20; and at Burlingame on August 11.

At all locations, the bannering, handbilling and other activities occurred in a relatively confined space directly in front of store entrances. The placement of a banner and multiple Union agents in this cramped area resulted in a constricted space in front of Apple stores that was shared by handbillers, video camera operators, Union agents using megaphones, passers-by, store customers and Apple store employees. On multiple occasions, handbillers and/or a banner blocked from public view Apple signage advertising such things as an in-store performance and new products. Additionally, the Union's placement of its banner and loud use of megaphones at the Stanford Apple store on multiple days in August disrupted the store's ability to use an adjacent sitting area to conduct customer training sessions and workshops. When advised of the situation and asked to move, Union agents refused.

#### **ACTION**

[FOIA Exemptions 2 and 5

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#### **Activity at Apple Headquarters**

This case in part involves bannering near common situs construction sites where both the primary South Bay and other, secondary construction employers are engaged in operations. In Moore Dry Dock,<sup>5</sup> the Board held that common

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<sup>5</sup> Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547, 549 (1950).

situs picketing generally is lawful if, among other things, the picketing is limited to places reasonably close to the situs of the dispute. Here, the Union erected banners at locations far from the Employer's primary gates (between 75 and 300 yards for the banners at the De Anza/Mariani intersection, and farther for the banner at the Infinite Loop location). Thus, if the bannering constitutes conduct tantamount to picketing, it is in contradiction to the Moore Dry Dock rules and is unlawful.

[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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<sup>6</sup> [FOIA Exemptions 2 and 5

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<sup>7</sup> [FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5 .]<sup>8</sup>

[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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<sup>8</sup>[FOIA Exemptions 2 and 5

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<sup>9</sup> [FOIA Exemptions 2 and 5

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<sup>10</sup> [FOIA Exemptions 2 and 5

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[*FOIA Exemptions 2 and 5*  
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**Activity at Apple Store Locations in the Bay Area**

[*FOIA Exemptions 2 and 5*

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However, on other dates at some Apple store locations, the Union used a combination of neutral bannerling, videotaping or still photography, and amplified speech. We

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<sup>11</sup> [*FOIA Exemptions 2 and 5*

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<sup>12</sup> [*FOIA Exemptions 2 and 5*

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conclude that the Region should issue complaint now, [FOIA Exemptions 2 and 5], specific allegations that the Union violated Section 8(b)(4)(ii)(B) at specific stores on specific dates where it used two or more of these elements to create a coercive atmosphere.

Taking video or photographs of neutral employees or the general public during a union campaign is not inherently coercive conduct. Rather, whether such conduct is coercive depends upon whether it takes place in conjunction with other actions indicating that a union might react adversely, thus putting individuals at fear of reprisals.<sup>13</sup> Furthermore, the loud broadcasting of a Union's message can exceed the bounds of lawful activity where it was undertaken with "the certain knowledge that they would inconvenience [neutrals] and others entitled to the peaceable use of the buildings."<sup>14</sup>

The totality of circumstances here - which includes a combination of neutral bannerings, the taking of photos and video of Apple employees and the public, and the loud and disruptive use of megaphones - constituted a clear effort by the Union to disrupt Apple customers from patronizing stores and communicating with store employees. Its large, 10-foot banners targeted Apple, a neutral in its labor dispute with South Bay. Its use of video and still photographic equipment indiscriminately recorded the activities of store customers, passers-by and store employees without explanation. Moreover, rather than try to

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<sup>13</sup> Interstate Cigar Co., 256 NLRB 496, 500-01 (1981). See Andy Frain, Inc., 239 NLRB 295, 307-08 (1978) (pretending to photograph customers of neutral employer without rationale "inherently coercive" under Section 8(b)(4)(B)).

<sup>14</sup> Carpenters (Society Hill Tower Owners' Assn.), 335 NLRB 814, 827 (2001), enfd. 50 Fed.Appx. 88 (3rd Cir. 2002) (union's loud, garbled broadcast of anti-employer message directed at tenants of neutral apartment building was coercive under Section 8(b)(4)(ii)(B)), quoting Service Employees Local 525 (General Maintenance Co.), 329 NLRB 638, 680 (1999), enfd. 52 Fed.Appx. 357 (9th Cir. 2002). See also Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 746 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (union's harassment of tenants was part of its effort to coerce neutral building owner to cease doing business with the contractor and violated Section 8(b)(4)(ii)(B)); Mine Workers (New Beckley Mining), 304 NLRB 71, 73 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (union's mass activity of milling around and shouting to motel guests was coercive).



insulate the stores from the effects of its dispute with South Bay, the Union repeatedly and intentionally engaged in conduct that it knew would disrupt the stores' operations.<sup>15</sup> Stationing its demonstrators and their equipment in constricted spaces in front of store entrances and, at some locations, immediately adjacent to customer training areas served to heighten the Union's intended disruptive effect. The broadcast by megaphone of its anti-Apple messages in small, enclosed areas was a loud and at least partially successful effort, as one Union agent told a store manager, to "make some noise." And when asked by Palo Alto store management to move its banners in order to make room for customer training in adjacent locations, the Union refused. Although any single element of the Union's tactics may not constitute coercion under Section 8(b)(4), we conclude that the combination of any two of these three disruptive elements (neutral bannering, the use of megaphones, and the taking of video/photos) at any store at the same time is sufficient to rise to the level of unlawful coercion with a cease doing business objective. While the General Counsel is holding in abeyance allegations solely concerning neutral bannering conduct, we conclude that, under the present circumstances, the Region should issue complaint now, absent settlement, to allege that the concurrent use of any two of these three tactics at a store location on a particular date violates Section 8(b)(4)(ii)(B).<sup>16</sup>

B.J.K.

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<sup>15</sup> Ready Mixed Concrete, 200 NLRB at 256 (union's picketing "was not engaged in so as to have as little impact on neutral employers and employees as possible, but, instead, was directed at them"; union made no effort to insulate neutral employers or ensure that its activities did not disrupt the neutrals' business).

<sup>16</sup> [*FOIA Exemptions 2 and 5*

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