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**Carpenters Local Union No. 1506, United Brotherhood of Carpenters and Joiners of America and Sunstone Hotel Investors, LLC, d/b/a Marriott Warner Center Woodland Hills**

**Carpenters Local Union No. 209, United Brotherhood of Carpenters and Joiners of America and Carignan Construction Company**

**Carpenters Local Union No. 209, United Brotherhood of Carpenters and Joiners of America and Gregory D. Bynum & Associates, Inc.**

**Carpenters Local Union No. 209, United Brotherhood of Carpenters and Joiners of America and Odyssey Development Services**

**Carpenters Local No. 743, United Brotherhood of Carpenters and Joiners of America and The Bakersfield Californian. Cases 3–CC–2121, 31–CC–2122, 31–CC–2123, and 31–CC–2124**

SEPTEMBER 30, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

This case concerns whether the Respondents Unions violated Section 8(b)(4)(ii)(B) of the Act by displaying large banners proclaiming a “labor dispute” at locations associated with several secondary employers.<sup>1</sup> The judge found that these banner displays did not violate Section 8(b)(4)(ii)(B) of the Act because they were not picketing and did not otherwise constitute threats, coercion, or restraint within the meaning of that section. He therefore dismissed the complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt his recommended Order dismissing the complaint.

We find that the Union’s conduct in this case was, for all relevant purposes, the same as the conduct found law-

ful in our recent decision in *Carpenters Local 1506 (Eliaison & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010) (*Eliaison*). In *Eliaison*, we considered three distinct locations where banners were displayed. At each location, the precise placement of the banner, its distance from entrances to the secondaries’ premises, and its orientation in relation to streets, sidewalks and entrances differed. We described the locations of the banners, including their distance from entrances with some detail in order to make clear that the banner displays did not block ingress or egress and did not create any form of confrontation between the union agents holding the banners and individuals wishing to enter or exit the facilities. *Eliaison*, 355 NLRB No. 159, slip op. at 2, 6–7 fn. 19. In particular, we noted that “[t]he banners were placed between 15 and 1,050 feet from the nearest entrance to the secondaries’ establishments.” *Id.* at 2. We observed that “[t]he banners were located at a sufficient distance from the entrances so that anyone wishing to enter or exit the sites could do so without confronting the banner holders in any way.” *Id.* at 6.

In this case, the banners at several locations were placed less than 15 feet from the entrances to the premises of the secondaries. The parties stipulated that one banner was located 10 feet from the entrance to the Marriott hotel in Woodland Hills; another banner was “next to” the access road leading to the Paragon Spa (although 400 feet from the entrance to its parking lot and 450 feet from the entrance to the Spa itself); another banner was 4 feet from the entrance to the foyer and 10 feet from the main entrance doorway of an office building containing the offices of Odyssey Development Services; and another banner was 8 feet from the front steps and 15 feet from the front door of The Bakersfield Californian building. There is no evidence in the record that suggests in any manner that the locations of those banners impaired ingress or egress or otherwise forced any form of confrontation between the banner holders and those entering or exiting the premises. We do not find that the locations of those banners distinguish this case from *Eliaison*. Given the serious constitutional questions that would be raised by the prohibition of banner displays as well as the serious consequences attaching to such a prohibition under Federal labor law (both of which we discussed in *Eliaison*), we are unwilling to draw an arbitrary line at some distance from the entrance to a secondary’s premises and hold that stepping over that line somehow transforms peaceful, expressive activity into coercion in the absence of some further evidence of coercion. A billboard is not coercive when placed 100 feet from the street and it does not become so simply because it is moved closer to the street. A union agent passing out

<sup>1</sup> On January 6, 2005, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel, Charging Party Marriott Warner Center Woodland, and Charging Party The Bakersfield Californian each filed exceptions and a supporting brief. The Respondents Unions filed a joint answering brief. On December 8, 2005, the Board rejected Marriot Warner Center Woodland Hills’ request that the Board accept its late-filed reply brief. *Marriot Warner Center Woodland Hills*, 345 NLRB 1334 (2005).

leaflets 100 feet from the entrance to a facility is not coercive and does not become so simply because he or she moves closer to the entrance.<sup>2</sup> Combining these facts, when union agents hold a stationary banner and at the same time distribute leaflets, we reach the same conclusion concerning the relevance of their location relative to entrances to a secondary's facility.<sup>3</sup>

Absent the use of traditional picket signs, patrolling, blocking of ingress or egress, or some other evidence of coercion, we conclude that, as in *Eliason*, the display of banners in this case was not coercive and therefore did not violate Section 8(b)(4)(ii)(B).

Accordingly, for the reasons stated in that decision, we find that Section 8(b)(4)(ii)(B) does not prohibit the banner displays in this case.

#### ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. September 30, 2010

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Craig Becker, Member

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Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The banner activity at issue in this case is essentially the same as in *Eliason & Knuth*, 355 NLRB No. 159 (2010). For the reasons fully set forth in the joint dissent in that case, I would find a violation here. The banner activity involves the placement of union agents holding large banners proximate to the premises of neutral

<sup>2</sup> Since the Supreme Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 577 (1988)(*DeBartolo*), the Board has not held that distribution of handbills violates Sec. 8(b)(4)(ii)(B) merely because of its proximity to the entrance to a secondary's premises. In fact, in one case denying injunctive relief against a banner display under Sec. 10(l), the District Court reasoned, "Indeed, peaceful activists making fervent efforts to pass out handbills directly in front of a building entrance could create a symbolic barrier much more confrontational than the banner at issue here, but such activity would presumably be legal under *DeBartolo*." *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719, 727-728 (D.Md. 2005).

<sup>3</sup> We also find that the positioning of several of the banners at issue in this case facing the street and on the "inside" edge of the sidewalk (with the sidewalk between the banner and the street) does not distinguish the conduct at issue from that found lawful in *Eliason*, supra, for the reasons stated in *Carpenters Local 1506 (Associated General Contractors of America)*, 355 NLRB No. 191 (September 22, 2010).

Employers who have done or are doing business with Employers who are the primary targets in a labor dispute with the Respondents. The predominate element of such banner activity is confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the neutral Employers' businesses, and thereby to further an objective of forcing those Employers to cease doing business with the primary Employers in the labor dispute. Like picketing, this banner activity is the precise evil that Congress intended to outlaw through Section 8(b)(4)(ii)(B), and the proscription of this conduct raises no constitutional concerns. I therefore dissent from my colleagues' failure to enforce the Act as intended.

Dated, Washington, D.C. September 30, 2010

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Brian E. Hayes,

Member

#### NATIONAL LABOR RELATIONS BOARD

*Katherine Braun Mankin, Esq.*, for the General Counsel.

*Daniel M. Shanley, Esq. (DeCarlo & Connor)*, of Los Angeles, California, for the Respondents.

*Matthew T. Wakefield, Esq., Ballard Rosenberg (Golper & Savitt)*, of Universal City, California, for Charging Party, Sunstone.

*Wayne A. Hersh, Esq., Berger Kahn*, of Irvine, California, for Charging Party, Carignan.

*Daniel K. Klingenberg, Esq. (Hogan & Klingenberg)*, of Bakersfield, California, for Charging Party, Bynum.

*Mark W. Robbins, Esq. (Littler Mendelson, P.C.)*, of Los Angeles, California, for Charging Party, The Bakersfield Californian.

#### DECISION

##### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in trial on October 19, 2004, in Los Angeles, California, pursuant to an order consolidating cases and notice of hearing issued by the Regional Director of Region 31 of the National Labor Relations Board on August 17, 2004.<sup>1</sup>

The five consolidated complaints arose as follows: On October 24, 2003, Sunstone Hotel Investors, LLC, d/b/a Marriott Warner Center Woodland Hills (Charging Party Sunstone) filed a charge with the Board docketed as Case 31-CC-2121 against Local Union No. 1506, United Brotherhood of Carpenters and Joiners of America (Respondent Local 1506) and amended that

<sup>1</sup> The order consolidated two additional complaints involving cases 31-CA-2126 and 31-CA-2127 filed by charging parties not involved herein. Those two cases were severed at the hearing and subsequently have not been and are not now part of the instant consolidated matter.

Charging Party Bakersfield Californian filed a Motion for Summary Judgment respecting Case 31-CC-2130 with the Board that it denied on October 18, 2004.

charge on November 3, 2003. The Regional Director for Region 31 of the National Labor Relations Board (the Director) issued a complaint respecting the charge on December 23, 2003.

On October 27, 2003, Carignan Construction Company (Charging Party Carignan) filed a charge with the Board docketed as Case 31-CC-2122 against Local Union No. 209, United Brotherhood of Carpenters and Joiners of America (Respondent Local 209). The Director issued a complaint respecting the charge on November 14, 2003.

On October 31, 2003, Gregory D. Bynum & Associates, Inc. (Charging Party Bynum) filed a charge with the Board docketed as Case 31-CC-2123 against Respondent Local 209. The Director issued a complaint respecting the charge on December 16, 2003.

On October 31, 2003, Odyssey Development Services (Charging Party Odyssey) filed a charge with the Board docketed as Case 31-CC-2124 against Respondent Local 209. The Director issued a complaint respecting the charge on December 2, 2003.

On May 20, 2004, the Bakersfield Californian (Charging Party The Bakersfield Californian) filed a charge with the Board docketed as Case 31-CC-2130 against Local Union No. 743, United Brotherhood of Carpenters and Joiners of America (Respondent Local 743). The Director issued a complaint respecting the charge on July 14, 2004.

The Respondents filed timely answers to the complaints. As will be set forth in significant detail below, the consolidated complaints allege and the answers deny that Respondent Local 209, Respondent Local 743 and Respondent Local 1506 (collectively the Respondents), at various time and places in the Bakersfield and Los Angeles areas, violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by means of the display of large banners.

#### FINDINGS OF FACT

Upon the entire record herein, including helpful briefs from the Respondents, the General Counsel, and Charging Parties Sunstone, Carignan, Bynum, and The Bakersfield Californian, I make the following findings of fact.<sup>2</sup>

##### I. JURISDICTION

Charging Party Sunstone, with offices in Woodland Hills, California, has been engaged in the Hotel business. At all relevant times it has annually purchased and received goods, supplies, and materials valued in excess of \$50,000 from firms which in turn purchased the goods, supplies and materials from outside the State of California.

Charging Party Carignan, with offices in Westlake Village, California, has been engaged as a general contractor in the construction industry doing commercial construction. It annually purchases and receives goods, supplies, and materials in the State of California valued in excess of \$50,000 directly from sources outside the State.

<sup>2</sup> As a result of the pleadings and substantial individual written stipulations covering each charge, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings and the stipulations.

Charging Party Bynum owns property on Truxtun Avenue in Bakersfield, California (the Truxtun property), which it leases to Paragon Salon Spa. As part of a construction improvement project in 2003, Charging Party Bynum contracted with S. C. Anderson to act as a general contractor for those improvements. Anderson in turn engaged Frye Construction as a subcontractor to provide framing, drywall and plastering at the Truxtun property. Frye, a California corporation with offices in Bakersfield, California, annually purchases and receives goods, supplies, and materials in the State of California valued in excess of \$50,000 directly from sources outside the State.

Charging Party Odyssey, with offices in Pasadena, California, has been engaged as a consulting service for city and urban planning reviews. At all relevant times it annually provided services valued in excess of \$50,000 to customers outside the state of California and/or to customers which made purchases directly outside the State.

Charging Party The Bakersfield Californian, with an office in Bakersfield, California, operates a daily newspaper. It annually purchases and receives goods, supplies, and materials in the State of California valued in excess of \$50,000 directly from sources outside the State.

Based on the above, there is no dispute and I find the Charging Parties, Frye Construction and each of them, are, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATIONS

The record establishes, there is no dispute, and I find that each of the Respondents are, labor organizations within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Events

For ease of understanding, the events respecting each Charging Party will be set forth separately.

###### 1. Charging Party Sunstone—Case 31-CC-2121

As part of its operation of the Marriott in Woodland Hills, California (the Hotel), Sunstone began renovating public areas on the Hotel premises including the lobby, restaurant and the bar (the Hotel jobsite). In connection with the renovation, Sunstone hired R. D. Olson as general contractor to oversee all aspects of the Hotel jobsite's renovation. In turn, Olson engaged Enterprise Interiors as a subcontractor to perform dry-wall work at the Hotel jobsite. There is no dispute that Sunstone, Olson and Enterprise are and have been at all material times persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

At all relevant times, Respondent 1506 was not recognized or certified as the collective-bargaining representative of any employees employed by Sunstone or Olson. Nor has Respondent 1506 demanded recognition as the collective-bargaining representative or sought to organize the employees employed by Sunstone or Olson. Further, Respondent 1506 does not dispute the wages paid by Sunstone or Olson to their employees. Respondent 1506 does dispute the wages paid by Enterprise to its employees who were working on Sunstone's, Ol-

sen's and other projects.

On October 16, 2003, an agent of Sunstone sent a letter to an agent of Respondent 1506 with the following text:

Please be advised that effective today, October 16, 2003, at 4:00 p.m. a "reserved gate" system has been established at our [Hotel jobsite]. Gate No. 1, located at Vassar Street near Oxnard, is being established for the sole and exclusive use of the employees, suppliers, and visitors of Enterprise Interiors. All other entrances to the [Hotel jobsite] shall be referred to as Gate No. 2. No one connected with Enterprise Interiors shall use Gate No. 2.

Any picketing activity which your union may direct against Enterprise Interiors must be conformed to their designated entrance at Gate No. 1 during the times which that company is on property: Monday through Friday, 7:30 a.m. to 2:00 a.m. [sic]. Picketing activity at any entrances other than Gate No. 1, and picketing at Gate 1 at any times in which Enterprise Interiors is not at our Hotel, will constitute unlawful secondary activity in violation of the National Labor Relations Act. Moreover, any unlawful picketing may result in legal action being commenced against your union to enjoin the activity and to recover any and all damages suffered thereby.

We trust that any picketing activity which might occur shall be done in a lawful and peaceful manner. We anticipate your cooperation in honoring the reserved gate system.

Charging Party Sunstone established Gates 1 and 2 as described in the letter.

On October 24, 2003 and continuing approximately to the end of the year, Respondent 1506 displayed at the Hotel jobsite a white banner approximately 18 feet long by 4 feet tall. The banner was blank on its back and white on its front side, with two lines of red capital letters approximately two feet high across the bulk of the banner stating:

SHAME ON

WARNER CENTER MARRIOTT

At each end of the banner, in black capital letters approximately one foot high with text slightly canted upwards toward the upper banner edge appeared the two-line entry:

LABOR

DISPUTE

The banner was framed on its top and sides and the frame had three base legs to which it was attached by ties. The frame arrangement itself had three base pieces or legs, which allowed it to stand. The bottom edge of the banner was approximately 8 inches off the ground. The banner was accompanied by two or three members and/or employees of Respondent 1506.

The banner was displayed approximately 4 days a week from about 9 a.m. to 2 p.m.: Once erected each day, the banner was not moved but remained stationary until it was taken down at day's end. The banner was displayed in the same place on all occasions: on the sidewalk of Oxnard Street immediately in

front of the Hotel. This location is approximately 10 feet to the right of the entrance to the Hotel driveway which was designated as Gate 2 in the letter quoted above, and which location is also approximately 10 feet from the pedestrian entrance to the Hotel property and 50 feet from the front door of the Hotel.

The driveway in question is used by Hotel visitors, guests, and employees to access the Hotel parking structure and the Hotel interior. It is the Hotel's only parking structure. Construction workers are not allowed to use the parking structure. Rather they were limited to public parking on the street.

The location of the banner was such that only its blank back side was visible from the inside of the hotel lobby. The front or printed side was visible to all persons entering the Hotel property with the exception of those workers using Gate 1 – as designated in the quoted letter above – and delivery persons entering via the loading dock driveway running between Warner Centers Towers and the Hotel. The banner was also visible to the occupants of vehicles approaching the Westfield Promenade Mall restaurants and movie theaters also located on Oxnard Street a major thoroughfare in Woodland Hills.

There is no dispute that Respondent 1506's agents selected the location of the banner so as to maximize exposure to the general public and all persons, including passing motorists and pedestrians, who might be in the area.

The banner was accompanied by a number of bearers, normally two or three in number, who physically held it in place but remained stationary at all times during the display period save for staggered break periods. The banner holders had handbills available for those who were interested, but did not seek out pedestrians to distribute the handbills nor did they engage in chanting, yelling, marching, or similar conduct. The banner holders did not physically block the ingress or egress of any person wishing to enter or leave the Hotel. There is no contention by the General Counsel that the handbills' representations were false or that the handbills or their distribution violated the Act.

The handbills were captioned: "SHAME ON WARNER CENTER MARRIOTT For Desecration of the American Way of Life [Capitalization in the original.]" Under the caption was the political cartoon-style, hand-drawn image of a rat eating the American Flag. Under the image, the text stated:

A rat is a contractor that does not pay all of its employees prevailing wage, including either providing or making payments for health care and pension benefits. Employees who work for a rat contractor are also rats.

**R. D. Olson** has received a contract to do new construction to the Warner Center Marriott at 21850 Oxnard St. in the city of Woodland Hills. **R. D. Olson** has contracted with **Enterprise, Inc.** to do the drywall. **Enterprise, Inc.** does not meet area labor standards for that work – it does not pay prevailing wages to all of their employees doing that work, including fully paying for family health care and pension.

Carpenters Local 1506 objects to substandard employers like **Enterprise, Inc.** working in the community. In our opinion the community ends up paying the tab for employee health care and the low wages paid tend to lower

general community standards, thereby encouraging crime and other social ills.

Carpenters Local 1506 believes that **Warner Center Marriott** has an obligation to the community to see that contractors who perform work on their buildings meet area standards. They should not be allowed to insulate themselves behind “independent” contractors. For this reason Local 1506 has a labor dispute with all these companies.

**PLEASE CALL [Warner Center Marriott General Manager] VICTOR MILLS AT [telephone number omitted] AND TELL HIM THAT YOU WANT HIM TO DO ALL THAT HE CAN TO CHANGE THIS SITUATION AND SEE THAT CONTRACTORS WHO PERFORM CONSTRUCTION WORK ON THE WARNER CENTER MARRIOTT MEET AREA LABOR STANDARDS.**

The members and families of Carpenters Local 1506 thank you for your support. Call [telephone number omitted] for further information. [Capitalization and bolding in original.]

## 2. Charging Party Carignan—Case 31–CC–2122

Commencing in or about November 2002, Charging Party Carignan (Carignan) was engaged as a general contractor to perform construction work at the Auto Mall in Thousand Oaks, California (the Auto Mall jobsite), under contract to Westlake Motors, Inc. d/b/a Nissan of Thousand Oaks (Nissan), a subsidiary of Silver Star Automotive Group (Silver Star), the owner of several automotive dealerships at the Auto Mall.

Carignan as the Auto Mall jobsite general contractor contracted with various subcontractors to perform construction services at the Auto Mall jobsite including C&H Construction Company to perform framing and drywall work at the Auto Mall jobsite. Carignan, Nissan, Silver Star and C&H Construction are and have been at all times material, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

At all relevant times, Respondent 209 was not recognized or certified as the collective-bargaining representative of any employees employed by Carignan, Nissan, or Silver Star. Nor has Respondent 209 demanded recognition as the collective-bargaining representative or sought to organize the employees employed by Carignan, Nissan, or Silver Star. Further, Respondent 209 does not dispute the wages paid by Carignan, Nissan, or Silver Star to their employees. Respondent 209’s primary labor dispute is with C&H Construction. Respondent 209 does dispute the wages paid by C&H Construction to its employees who were working on Carignan, Nissan, Silver Star and other projects.

From on or about April 30, 2003, and continuing to June 25, 2004, Respondent Local 209 displayed at the jobsite a banner approximately 20 feet by 4 feet in size. The banner was displayed on weekdays, four to five times a week, from approximately 9 a.m. to 3 p.m. The banner was blank on its back side and white on its front side, with two lines of red letters approximately two feet high capitalized, as set forth below, across

the bulk of the banner:

SHAME ON

NISSAN OF THOUSAND OAKS

At each end of the banner, in black capital letters approximately one foot high with text slightly canted upwards toward the upper banner edge appeared the two-line entry:

LABOR

DISPUTE

The banner was framed on its top and sides, but the frame but did not have “feet” and, thus, could not stand upright on its own. Rather it was held upright and stationary just touching the ground by 3 or 4 accompanying banner bearer members or employees of Respondent 209. Once the banner was erected at the beginning of a given day, it was not moved and remained stationary are the place of erection until it was taken down and removed at the end of the day. The banner bearers necessary to hold up the banner, normally three in number, remained with the stationary banner at all times save for breaks.

The banner was located on a public sidewalk at the corner of Cord and Auto Mall Drive in Thousand Oaks, California. At this location the banner was approximately 110 feet from the main dealership entry, approximately 160 feet from the service drive entry, and approximately 100 feet from the construction gate. The banner was also highly visible from Highway 101, a major traffic artery in Southern California.

There is no dispute that Respondent 209’s agents selected the location of the banner so as to maximize exposure to the general public and all persons, including passing motorists and pedestrians, who might be in the area.

The banner holders had handbills available for those who were interested, but did not seek out pedestrians to distribute the handbills nor did they engage in chanting, yelling, marching, or similar conduct. The banner holders did not physically block the ingress or egress of any person wishing to enter of leave the Auto Mall. There is no contention that the handbills’ representations were false or that the handbills or their distribution violated the Act.

The handbills were captioned: “SHAME ON NISSAN OF THOUSAND OAKS For Desecration of the American Way of Life [Capitalization in the original.]” Under the caption was the political cartoon-style, hand-drawn image of a rat eating the American Flag. Under the image, the text stated:

A rat is a contractor that does not pay all of its employees prevailing wage, including either providing or making payments for health care and pension benefits.

Shame on **Nissan of Thousand Oaks** for contributing to erosion of area standards for carpenter craft workers. **C&H Construction** was a subcontractor for **Carignan Construction** on the **Nissan Dealership** project. **C&H Construction** does not meet area labor standards for all its carpenter craft workers, including fully paying for family health benefits and pension.

Carpenters Local 209 objects to substandard employers like **C&H Construction** working in the community. In our opinion the community ends up paying the tab for employee health care and the low wages paid tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 209 believes that **Nissan of Thousand Oaks** has an obligation to the community to see that area standards are met at all their projects, including any future work. They should not be allowed to insulate themselves behind “independent” contractors. For this reason Local 209 has a labor dispute with all the companies named here.

PLEASE TELL NISSAN OF THOUSAND OAKS THAT YOU WANT THEM TO DO ALL THAT THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORKERS ON THEIR DEALERSHIPS.

The members and families of Carpenters Local 209 thank you for your support. Call [telephone number omitted] for further information. [Capitalization and bolding in original.]

### 3. Charging Party Bynum—Case 31–CC–2123

Charging Party Bynum (sometimes Bynum) owns the Truxtun property, which it leases to Paragon Salon Spa. As part of a construction improvement project in 2003, Charging Party Bynum contracted with S. C. Anderson to act as a general contractor for those improvements. Anderson in turn engaged Frye Construction as a subcontractor to provide framing, drywall and plastering at the Triton property. Bynum, Anderson, and Paragon are and have been at all material times, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

At all relevant times, Respondent 209 was not recognized or certified as the collective-bargaining representative of any employees employed by Bynum, Anderson, or Paragon. Nor has Respondent 209 demanded recognition as the collective-bargaining representative or sought to organize the employees employed by Bynum, Anderson, or Paragon. Further, Respondent 209 does not dispute the wages paid by Bynum, Anderson, and Paragon to their employees. Respondent 209’s primary labor dispute is with Frye. Respondent 209 does dispute the wages paid by Frye to its employees who were working on Bynum, Anderson, and Paragon and other projects.

Frye completed its construction work at the Truxtun property in March 2003. All subcontractors completed their construction work at the Truxtun property by approximately April 22, 2003. Paragon began its occupancy of the property on April 22, 2003.

On July 8, 2003, Respondent Local 209 sent a letter to S. C. Anderson captioned: “RE: NOTICE OF LABOR DISPUTE – FRYE CONSTRUCTION” [Capitalization in original] with the following text:

It has come to our attention that Frye Construction may be currently bidding on one or more of your upcom-

ing projects. Please be informed that Carpenters Local 209 has a labor dispute with Frye Construction. Frye does not meet area labor standards – it does not pay prevailing wages to all its employees, including fully paying for health benefits and pension.

Local 209 has made a solid commitment of personnel and resources to protect and preserve area standard wages, including providing or making payments for family health care and a dignified retirement for all area carpentry craft workers. Therefore we are asking that you use your managerial discretion to not allow Frye to perform any work on any of your projects unless and until it generally meets area labor standards fit for all of its carpentry craft-work.

We want you to be aware that our new and aggressive public information campaign against Frye will encompass all parties associated with projects where Frye is employed. That campaign will include highly visible lawful banner displays and distribution of handbills at the jobsites and premises of property owners, developers, general contractors, and other firms involved with projects where Frye is employed. It will also include lawful picketing and demonstration activity. We certainly prefer to work cooperatively with all involved parties rather than to have an adversarial relationship with them.

If you agree to comply with the request we have made in this letter, or if our information about Frye being involved with any of your projects is incorrect, please call undersigned immediately. Doing so will provide the greatest protection against your firm becoming publicly involved in this dispute through misunderstanding or error.

On or about October 9, 2003 and continuing almost without interruption until April 1, 2004, Respondent 209 located a banner of the same type as that described respecting Respondent Local 209 and Charging Party Carignan immediately above. The banner’s message differed only in that the red text stated:

SHAME ON

PARAGON SPA

All other aspects of the banners sighting, management, and display was identical to that described respecting Carignan above save the banner was placed at 9:30 a.m. at the beginning of the day and was displayed four days per week. The banner bearer’s conduct was also identical to the conduct of those individuals respecting Carignan as described above.

The banner was located at all times approximately 30 to 40 feet from Truxtun Avenue, Bakersfield, California. Truxtun is the main artery between east and west Bakersfield. The banner was visible and legible to all traffic traveling east on Truxtun Avenue. The banner was visible to traffic traveling west on Truxtun, but it may not have been legible. The banner was located on the grass next to the access road that runs from Truxtun road into Paragon’s parking lot. Paragon has no entrance directly off Truxtun Avenue. Almost all employees, clients, customers, visitors, and delivery persons enter Paragon via the access road off Truxtun Avenue, which leads directly into the parking lot and, from there, to the door of Paragon.

The banner was located approximately 400 feet from Paragon's parking lot and approximately 450 feet from the door into Paragon. The parking lot is also used by employees, patients, visitors, and persons making deliveries to Interim Health Care, which is locating in a building approximately 40 feet west of Paragon.

At all relevant times, the banner holders did no more than hold up the banner and give fliers to any interested members of the public and did not engage in chanting, yelling, marching or similar conduct. Nor did they physically block the ingress or egress of any person wishing to enter or leave the paragon.

The fliers were captioned: "SHAME ON Paragon Spa For Desecration of the American Way of Life [Capitalization in the original.]" Under the caption was the political cartoon style hand drawn image of a rat eating the American Flag. Under the image, the text stated:

A rat is a contractor that does not pay all of its employees prevailing wages, including either providing or making payments for health care and pension benefits.

Shame on **Paragon Salon and Day Spa** for contributing to erosion of area standards for carpenter craft workers. **Frye Construction** was a subcontractor for **S. C. Anderson** on **Paragon Spa's** project located in the city of Bakersfield. **Frye Construction** does not meet area labor standards for all its carpenter craft workers, including fully paying for family health benefits and pension.

Carpenters Local 209 objects to substandard employers like **Frye Construction** working in the community. In our opinion the community ends up paying the tab for employee health care and the low wages paid tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 209 believes that **Paragon Salon and Day Spa** has an obligation to the community to see that area standards are met at all their projects, including any future work. They should not be allowed to insulate themselves behind "independent" contractors. For this reason Local 209 has a labor dispute with all the companies named here.

**PLEASE TELL PARAGON SALON AND DAY SPA THAT YOU WANT THEM TO DO ALL THAT THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK ON THEIR PROJECTS.**

The members and families of Carpenters Local 209 thank you for your support. Call [telephone number omitted] for further information. [Capitalization and bolding in original.]

#### 4. Charging Party Odyssey—Case 31–CC–2124

Charging Party Odyssey (sometimes Odyssey) as part of its consulting service was employed as a consultant in or about April 2000 for Pacer Communities, LLC (Pacer), owner and developer of a 53-unit condominium project in Pasadena, California (the Odyssey jobsite). The work was concluded in approximately April 2002. Development of the project began in February 2003 and construction at the Odyssey jobsite began in

March 2003.

In connection with construction at the Odyssey jobsite, Pacer engaged J. A. Hill Corporation (Hill) as the general contractor. Hill in turn engaged Covi Concrete (Covi) as a subcontractor to construct a subterranean parking structure at the Odyssey jobsite. Odyssey, Pacer, Hill and Covi are, and have been at all times material, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

At all relevant times, Respondent 209 was not recognized or certified as the collective-bargaining representative of any employees employed by Odyssey, Pacer, or Hill. Nor has Respondent 209 demanded recognition as the collective-bargaining representative or sought to organize the employees employed by Odyssey, Pacer, or Hill. Further, Respondent 209 does not dispute the wages paid by Odyssey, Pacer, or Hill to their employees. Respondent 209's primary labor dispute is with Covi. Respondent 209 does dispute the wages paid by Covi to its employees who were working on Odyssey's, Pacer's, or Hill's and other projects.

On June 2, 2003, an agent of Local 209 sent a letter to an agent of Odyssey captioned: "RE: NOTICE OF LABOR DISPUTE—COVI CONCRETE" [Capitalization in original] with the following text:

It has come to our attention that Covi Concrete may be currently bidding on one or more of your upcoming projects. Please be informed that Carpenters Local 209 has a labor dispute with Covi Concrete. Covi does not meet area labor standards—it does not pay prevailing wages to all its employees, including fully paying for health benefits and pension.

Local 209 has made a solid commitment of personnel and resources to protect and preserve area standard wages, including providing or making payments for family health care and a dignified retirement for all area carpentry craft workers. Therefore we are asking that you use your managerial discretion to not allow Covi to perform any work on any of your projects unless and until it generally meets area labor standards fit for all of its carpentry craft-work.

We want you to be aware that our new and aggressive public information campaign against Covi will encompass all parties associated with projects where Covi is employed. That campaign will include highly visible lawful banner displays and distribution of handbills at the jobsites and premises of property owners, developers, general contractors, and other firms involved with projects where Covi is employed. It will also include lawful picketing and demonstration activity. We certainly prefer to work cooperatively with all involved parties rather than to have an adversarial relationship with them.

If you agree to comply with the request we have made in this letter, or if our information about Covi being involved with any of your projects is incorrect, please call undersigned immediately. Doing so will provide the

greatest protection against your firm becoming publicly involved in this dispute through misunderstanding or error.

Attached to the letter was an attachment representing that labor union activity is exempt from California trespass law and that the Carpenters' activities are protected.

On June 4 and 5, 2003, Odyssey responded to Respondent 209 by letters informing them that Odyssey had completed its work on the project and that it had no power to compel Pacer as the developer or Hill as general contractor to discontinue employment of subcontractor Covi. Odyssey further indicated it was not a party to the dispute Respondent 209 had with Covi.

On June 13, 2003, and continuing until approximately mid-December 2003, Respondent 209 displayed a banner of the same type as that described respecting Respondent Local 209 and Charging Party Carignan immediately above. The banner's message differed only in that the red text stated:

SHAME ON

ODYSSEY

All other aspects of the banner's sighting, management, and display were identical to that described respecting Carignan above. The banner bearers' conduct was also identical to the conduct of those individuals respecting Carignan as described above.

From June 13, 2003, until early November 2003, the banner was displayed on the sidewalk approximately four feet from the entrance to the foyer and about ten feet to the main entrance of the doorway of the building located at 51 Dayton Street, Pasadena. The main entrance to the building serves as the entrance to Odyssey and other businesses, including Pasadena Advertising, Tolkien Group, Green Street Advertising and Henry Johnstone Interior Design.

In early November 2003, the banner was moved, and from early November until mid-December 2003, the banner was displayed on the sidewalk at the corner of Fair Oaks and Dayton in Pasadena, California, approximately 75 yards from the entrance to the foyer of 51 Dayton Street, Pasadena, California. The banner site is approximately two to three miles from the Odyssey jobsite and is designated as an historical landmark by the National Register of Historic Places and is within the historic neighborhood called Old Pasadena, which is known for its restaurants, shops and street life. Fair Oaks is a major thoroughfare in Pasadena.

Respondent's banner holders also had handbills available, although they did not seek out pedestrians to distribute the handbills to. The General Counsel does not contend that the factual representations made in the handbill are either false or true. The General Counsel does not contend that the handbill or its distribution violates the Act.

The handbills were captioned: "SHAME ON Odyssey Development Spa For Desecration of the American Way of Life [Capitalization in the original.]" Under the caption was the political cartoon style hand-drawn image of a rat eating the American Flag. Under the image, the text stated:

A rat is a contractor that does not pay all of its employees prevailing wages, including either providing or making payments for health care and pension benefits.

Shame on **Odyssey Development Service** for contributing to erosion of area standards for carpenter craft workers. **Covi Concrete** is a subcontractor for **Hill Contracting on Pacer Communities** mixed use project located in the city of Pasadena. Odyssey was Pacer's consultant interfacing with the city. **Covi** does not meet area labor standards for all its carpenter craft workers, including fully paying for family health benefits and pension.

Carpenters Local 209 objects to substandard employers like **Covi** working in the community. In our opinion the community ends up paying the tab for employee health care and the low wages paid tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 209 believes that **Odyssey** has an obligation to the community to see that area standards are met for construction on projects, where they are involved including any future projects. They should not be allowed to insulate themselves behind "independent" contractors. For this reason Local 209 has a labor dispute with all the companies named here.

**PLEASE TELL ODYSSEY DEVELOPMENT THAT YOU WANT THEM TO DO ALL THAT THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK ON PROJECTS THEY ARE INVOLVED IN.**

The members and families of Carpenters Local 209 thank you for your support. Call [telephone number omitted] for further information. [Capitalization and bolding in original.]

5. Charging Party The Bakersfield Californian—Case 21–CC–2130

Charging Party The Bakersfield Californian (sometimes The Bakersfield Californian) in its publication of a daily newspaper utilizes a building at 1707 Eye Street, Bakersfield, California. The building is located on the northwest corner of the intersection of Eye Street and 17<sup>th</sup> Street. The building is bounded on the east by Eye Street, on the south by 17<sup>th</sup> Street, on the west by "H" Street and on the north by an alley. The front door entrance to the building is in the middle of the east side of the building facing Eye Street. There are six steps leading to the front door entrance.

In January 2004, Charging Party The Bakersfield Californian began remodeling its building (the Bakersfield Californian jobsite). It retained BFGC Architects Planners Inc. (BFGC) as construction manager/design consultant to oversee all aspect of the remodeling. On the recommendation of BFGC, The Bakersfield Californian contracted with Frye Construction as a subcontractor to perform drywall services at the Bakersfield Californian jobsite.

The Bakersfield Californian, BFGC and Frye are, and have been at all times material, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

At all relevant times, Respondent 743 was not recognized or certified as the collective-bargaining representative of any em-

ployees employed by The Bakersfield Californian or BFGC. Nor has Respondent 743 demanded recognition as the collective-bargaining representative or sought to organize the employees employed by The Bakersfield Californian or BFGC. Further, Respondent 743 does not dispute the wages paid by The Bakersfield Californian, and BFGC to their employees. Respondent 209's primary labor dispute is with Frye. Respondent 743 does dispute the wages paid by Frye to its employees who were working on The Bakersfield Californian's, BFGC's, and other projects.

On March 11, 2004, Respondent 743 sent a letter to BFGC and on April 8, 2004 sent a letter to The Bakersfield Californian. The letters were essentially identical. They were captioned: "RE: NOTICE OF LABOR DISPUTE – FRYE CONSTRUCTION" [Capitalization in original] with the following text:

It has come to our attention that Frye Construction may be currently bidding on one or more of your upcoming projects. Please be informed that Carpenters Local 743 has a labor dispute with Frye Construction. Frye does not meet area labor standards – it does not pay prevailing wages to all its employees, including fully paying for health benefits and pension.

Local 743 has made a solid commitment of personnel and resources to protect and preserve area standard wares, including providing or making payments for family health care and a dignified retirement for all area carpentry craft workers. Therefore we are asking that you use your managerial discretion to not allow Frye to perform any work on any of your projects unless and until it generally meets area labor standards fit for all of its carpentry craft-work.

We want you to be aware that our new and aggressive public information campaign against Frye will encompass all parties associated with projects where Frye is employed. That campaign will include highly visible lawful banner displays and distribution of handbills at the jobsites and premises of property owners, developers, general contractors, and other firms involved with projects where Frye is employed. It will also include lawful picketing and demonstration activity. We certainly prefer to work cooperatively with all involved parties rather than to have an adversarial relationship with them.

If you agree to comply with the request we have made in this letter, or if our information about Frye being involved with any of your projects is incorrect, please call undersigned immediately. Doing so will provide the greatest protection against your firm becoming publicly involved in this dispute through misunderstanding or error.

On April 23, 2004, Respondent local 743 displayed at the jobsite a banner approximately 20 feet by 4 feet in size. The banner was blank on its back and white on its front side with two lines of red letters approximately two feet high capitalized as set forth below across the bulk of the banner:

SHAME ON

THE BAKERSFIELD CALIFORNIAN

At each end of the banner, in black capital letters approximately one foot high with text slightly canted upwards toward the upper banner edge appeared the two-line entry:

LABOR

DISPUTE

The banner was displayed on April 23, 2004, on the public sidewalk in front of the flagpoles, directly in front of the front steps leading to the front door approximately 8 feet from the steps and 15 feet from the front door entrance of The Bakersfield Californian jobsite. The language on the banner never changed. At no time did the banner identify Frye as the employer with whom Local 743 had a primary labor dispute.

On April 27, 2004, and continuing through June 24, 2004, the banner was displayed at the Norwest corner of 17<sup>th</sup> and Eye Streets within 15 feet of the front steps and 25 feet from the front door entrance.

The banner was displayed at the jobsite on weekdays, generally five days a week, from approximately 9:00 a.m. to 3 p.m. which included days and times when no employees nor representatives of Frye were at the jobsite. The banner was accompanied by at least three individuals who were either members of or employed by Local 743 who were required to physically hold the banner and who remained stationary at all times save during their break periods. These individuals had handbills available, but did not seek out pedestrians to distribute the handbills. Rather they held up the banner and gave handbills only to any interested member of the public. They did not chant, yell, march or engage in similar conduct.

The General Counsel does not contend that the factual representations in the handbill are false or true nor does the General Counsel contend the handbills or their distribution violate the Act. The handbills were captioned: "SHAME ON The Bakersfield Californian For Desecration of the American Way of Life [Capitalization in the original.]" Under the caption was the political cartoon style hand drawn image of a rat eating the American Flag. Under the image, the text stated:

A rat is a contractor that does not pay all of its employees prevailing wages, including either providing or making payments for health care and pension benefits.

Shame on **The Bakersfield Californian** for contributing to erosion of area standards for carpenter craft workers. **Frye Construction** is a contractor and **BFGC Architects Planners, Inc.** is the **Construction Manager** on **The Bakersfield Californian** project located in the city of Bakersfield. **Frye Construction** does not meet area labor standards for all its carpenter craft workers, including fully paying for family health benefits and pension.

Carpenters Local 743 objects to substandard employers like **Frye Construction** working in the community. In our opinion the community ends up paying the tab for employee health care and the low wages paid tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 743 believes that **The Bakersfield Californian** has an obligation to the community to see that area standards are met for construction work at all their projects, including any future work. They should not be allowed to insulate themselves behind “independent” contractors. For this reason Local 209 has a labor dispute with all the companies named here.

**PLEASE CALL RICHARD BEENE CEO OF THE BAKERSFIELD CALIFORNIAN AT [telephone number omitted] AND TELL HIM THAT YOU WANT HIM TO DO ALL HE CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK ON THEIR PROJECTS.**

The members and families of Carpenters Local 743 thank you for your support. Call [telephone number omitted] for further information. [Capitalization and bolding in original.]

At all times the banner was visible to every customer and visitor to The Bakersfield Californian as all customers and visitors enter the building by the front door entrance. It was likewise visible to all employees of The Bakersfield Californian, construction workers engaged in the remodel of the jobsite and all other persons who entered the building using the front door. The backside of the banner was visible from inside the building but the side so facing the building was blank.

Respondent 743’s placement of the banner was selected so as to maximize exposure to the general public and all persons, including passing motorists and pedestrians, who might be in the area or entering the building.

#### *B. Allegations*

##### 1. Charging Party Sunstone—Case 31–CC–2121

The General Counsel’s complaint in Case 31–CC–2121 at paragraph 8 alleges that Respondent Local 1506’s display of its banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 9 and 10 further allege that the bannering threatened, coerced and restrained Charging Party Sunstone and other persons engaged in commerce or in industries affecting commerce, and that an object of Respondent Local 1506’s conduct was to force or require Charging Party Sunstone and other persons to cease doing business with Enterprise. Finally, the complaint alleges that by these actions Respondent Local 1506 engaged in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

##### 2. Charging Party Carignan—Case 31–CC–2122

The General Counsel’s complaint in Case 31–CC–2122 at paragraph 6 alleges that Respondent Local 209’s display of its banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 7 and 8 further allege that the bannering threatened, coerced and restrained Charging Party Carignan and/or Nissan and/or Silver Star and other persons engaged in commerce or in industries affecting commerce and that an object of Respondent Local 209’s conduct was to force or require Charging Party Carignan

and/or Nissan and/or Silver Star and other persons to cease doing business with C&H. Finally the complaint alleges that by these actions Respondent Local 209 is engaging in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

##### 3. Charging Party Bynum—Case 31–CC–2123

The General Counsel’s complaint in Case 31–CC–2123 at paragraph 6 alleges that Respondent Local 209’s display of its banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 7 and 8 further allege that the bannering threatened, coerced and restrained Charging Party Bynum and/or Paragon and/or Anderson and other persons engaged in commerce or in industries affecting commerce, and that an object of Respondent Local 209’s conduct was to force or require Charging Party and other persons to cease doing business with Frye. Finally the complaint alleges that by these actions Respondent Local 209 is engaging in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

##### 4. Charging Party Odyssey—Case 31–CC–2124

The General Counsel’s complaint in Case 31–CC–2124 at paragraphs 7(b) and 7(c) alleges that Respondent Local 209’s display of its banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 8 and 9 further allege that the bannering threatened, coerced and restrained Charging Party Odyssey and other persons engaged in commerce or in industries affecting commerce and that an object of Respondent Local 209’s conduct was to force or require Charging Party Odyssey and other persons to cease doing business with Covi. Finally, the complaint alleges that by these actions Respondent Local 209 is engaging in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

##### 5. Charging Party The Bakersfield Californian— Case 21–CC–2130

The General Counsel’s complaint in Case 31–CC–2130 at paragraphs 6(b) and 6(c) alleges that Respondent Local 743’s display of its banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 7 and 8 further allege that the bannering threatened, coerced and restrained Charging Party The Bakersfield Californian and other persons including TBC and BFGC engaged in commerce or in industries affecting commerce and that an object of Respondent Local 743’s conduct was to force or require Charging Party The Bakersfield Californian and other persons including TBC and BFGC to cease doing business with Frye. Finally the complaint alleges that by these actions Respondent Local 209 is engaging in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

#### *C. Analysis and Conclusions*

##### 1. Simple overview of the applicable law

The United States Constitution’s First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for

a redress of grievances.

The activities of labor organizations in engaging in various forms and types of picketing, handbilling and other actions contain different mixtures of speech and non-speech conduct. Congress in Sections 8(b)(4) and 8(b)(7) of the Act has regulated labor organization conduct in various ways. All federal law, including the National Labor Relations Act, must be viewed with the “free speech” protection of the First Amendment in mind. This is so because the Supreme Court has established as a cardinal principle or rule of statutory construction that where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Section 8(b)(4)(ii)(B) of the Act reads, in part, as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents . . . .

(4)(ii) To threaten, coerce, or restrain any person engaged in commerce or in a business affecting commerce where . . . an object thereof is . . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the product of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

*Provided Further*, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . of . . . a primary labor dispute . . . .

The statutory language has been characterized by the Court as reflecting “the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear upon offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own.” *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

As the quoted language of the Act provides there are separate elements necessary to establish a violation of Section 8(b)(4)(ii)(B). First, a labor organization must engage in conduct, which threatens, coerces or restrains. Picketing, a traditional means of expression by a labor organization has been found coercive in a variety of settings and circumstances. Not all labor organization conduct is threatening, coercive, or restraining within the meaning of Section 8(b)(4)(ii)(B). Thus in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988), the Court held that the peaceful distribution of handbills by a labor organization without any accompanying picketing or patrolling, was not coercive and therefore did not violate Section 8(b)(4) of the Act.

A necessary element of a violation of this section of the Act

is that the conduct at issue is prohibited secondary as opposed to the permitted primary picketing. The case law and analysis respecting “secondary” versus “primary” activity is famously complex and a very substantial body of case law deals with these issues.

Another aspect or element of a violation of Section 8(b)(4) of the Act deals with the labor organizations motive or object. By the terms of the statute, an object of the conduct must be to force or require any person to cease dealing with or doing business with any other person. *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 673 (1961); *Food & Commercial Workers Local 1776 (Carpenters Health Fund)*, 334 NLRB 507 at 507 (2001); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 742-743 (1993).

Finally, the second proviso, or “Provided Further” language of the statute quoted above, makes it clear that “publicity, other than picketing, for the purpose of truthfully advising the public . . . of . . . a primary labor dispute” may not be prohibited by and therefore is not a violation of Section 8(b)(4) of the Act. Yet another body of law addresses this distinction.

## 2. Positions of the Parties

### a. *The nature of the conduct involved*

The General Counsel and Charging Parties argue that the various incidents of bannerng engaged in by Respondent’s as alleged in the complaints and described above were within the prohibitions of Section 8(b)(4)(ii)(B) of the Act. Legally equivalent or akin to picketing, they argue, Respondent’s bannerng conduct is coercive and restrained persons admittedly engaged in commerce or in a business affecting commerce. Further, they argue the impermissible object of the conduct is essentially admitted and in all events on the stipulated facts must be found under well established law to constitute conduct, which, under the terms of the statute, attempted to force or require the persons involved to cease doing business with the other named persons.

The Respondents do not attempt to defend their actions under a “picketing” analysis. Rather, the Respondents challenge the government’s initial characterization of the conduct. Thus, the Respondents argue their actions were not picketing but were rather simply a benign display of stationary banners. And, as such, they argue the conduct was non-coercive within the meaning of Section 8(b)(4)(ii)(B) of the Act and, further, was not conduct that Congress meant to prohibit in passing this portion of the statute into law. The Respondents seek to analogize the conduct involved here as not picketing but rather more like the maintenance of a billboard publicizing a labor dispute, an action the General Counsel has conceded in related cases to be without the prohibitions of the Act. In making this argument the Respondents advance the Court’s decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988).

### b. *The decisional history of the issue and the question of binding precedent*

Apparently the bannerng at issue herein has been undertaken by various Carpenters’ locals in recent times and many of such occurrences have been the subject of actions under the

Act. All the parties have cited earlier determinations in cases quite similar to those before me. Each side advances the determinations favorable to its position as conclusive while discounting or dismissing contrary findings. It is appropriate to review the holdings cited.

The stipulations of the parties respecting each charge and allegation contains the statement:

[The] Respondent asserts that, in engaging in and/or maintaining the conduct described above, it relied on two memoranda from the office of the General Counsel, Division of Advice: *United Brotherhood of Carpenters (Best Interiors)*, 1997 WL 731444 (Advice memo, March 13, 1997) and *Rocky Mountain Regional Conference of Carpenters Standard Drywall*, 2000 WL 174630 (Advice memo, April 3, 2000), as well as the decisions in *Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp. 2d 1155 (C.D. CA 2003) and *Overstreet v. Carpenters Union Local 1506*, 2003 U.S. Dist. LEXIS 19854 (S.D. CA 2003).

On brief counsel for the Respondents cites a third District Court decision: *Benson v. United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498*, Case No. 2:04-CV-00782 PGC (D Utah September 27, 2004).

In addition to the authorities cited immediately above, the “banner issue” at the heart of the instant cases has been the subject of several administrative law judge unfair labor practice decisions: *Southwest Regional Council of Carpenters, et al (New Star General Contractors, Inc.)*, JD(SF) 76-04 (Judge Gregory Z. Meyerson); *Southwest Regional Council of Carpenters, et al ((Carnigan Construction Company)*, JD(SF)14-04 (Judge James M. Kennedy); *Local Union No. 1827, United Brotherhood of Carpenters And Joiners Of America (United Parcel Service)*, JD(SF)30-03 (Judge Lana H. Parke); *Southwest Regional Council of Carpenters (Held Properties)*: JD(SF)24-04 (Judge Burton Litvack).

The cited decisions of the United States District Courts address the unfair labor practice element of this case in the context of an action brought under Section 10(l) of the Act under which the District Court is asked to make a finding that there is reasonable cause to believe that Section 8(b)(4)(B) has been violated. In the cases cited, the United States District Courts were not convinced that reasonable cause existed and made contrary finding that the banner and associated handbilling did not rise to the level of threats, coercion, or restraint within the meaning of Section 8(b)(4)(b) of the Act. The decisions of the United States District Courts, however, are not binding precedent on an administrative law judge deciding an unfair labor practice case.

The cited decisions of the four administrative law judges split equally between the arguments of the contending parties herein. These decisions however are not binding on me and are, in fact, before the Board for decision on exceptions. The memoranda of the General Counsel’s Division of Advice are simply prosecutorial positions respecting which the General Counsel may modify or reverse. They are not binding on me.

While none of the decisions and memoranda noted are binding on me, the legal analysis of the various learned jurists and legal scholars, in the decisions and briefs submitted to me, in

their totality, skillfully illuminate a subtle area in a traditionally difficult area of the law. The issue cries out for a definitive resolution by higher authority, which will doubtless soon be forthcoming. In the meantime, given the as-yet-incomplete resolution of the question, it is necessary to consider the arguments of the parties and reach a determination without guiding precedential determination by higher authority.

### 3. The General Counsel’s Threshold Arguments

#### a. *The Respondents conduct amounts to signal picketing*

The General Counsel notes on brief at 18 that signal picketing is described as “activity, short of a true [traditional] picket line, which acts as a signal to neutrals that sympathetic action on their part is desired by the union.” *Iron Workers Local 433 (R.F. Erectors) v. NLRB*, 598 F.2d 1154, 1158 fn. 6 (9th Cir. 1979), enfg. 233 NLRB 283 (1977). The General Counsel argues that the large banners at issue herein, considering their highly visible location and their “flanking agents” constitute a “similarity to a picket line [that] is not coincidental.” The government further argues that the banner language using the term “labor dispute” and naming only neutral employers sent out a “call to action” that “signaled that they desired a boycott of the named employers.” (GC brief at 20.)

If the Board determines that certain conduct is a signal as described above, it evaluates that conduct as if it had manifested in the traditional fashion, i.e. as if it were regular picketing. On the facts of the instant cases, the General Counsel’s argument is that, since the banners are but signals, any consideration of the complaint allegations respecting violations of Section 8(b)(4) of the Act should not founder on the fact that banners were displayed rather than traditional patrolling pickets with signs. The General Counsel thus uses the term “signal” to establish that the conduct is picketing rather than non-picketing conduct.

I reject the General Counsel’s signal picketing arguments herein. While there is no doubt that the use of the term ranges through the decisional law without specific definition and has been used more broadly, the origins of the doctrine, like the meaning of the word “signal” itself, require a show or pretense, a mark, device or course of conduct carrying some special meaning or import beyond what occurred. Thus cases involving a signal analysis often involve prior arrangement between agents of a labor organization and jobsite employees to take action when some agreed upon action is taken. Or non-traditional or non-picketing conduct occurs which is found to be a pretense or device, which is understood to be and is reacted to by employees on the site as if a traditional patrolling picket was present.

I do not find the banners at issue herein nor the conduct of the Respondents’ agents attending them to either have engaged in actions or to have constituted in their physical presence which constitute a signal in the sense described above. The banners simply are not a signal or pretense for any other union action or conduct. On this stipulated factual record, in each separate case and situation as described above, I simply find none of the symbolic, substitutional or prearranged elements required to make the banner more than it appeared. Rather, I find they simply are what the banners are and that the banners placed and maintained by the Respondents must stand or fall on

their own in the settings and circumstances of their display as described in the factual stipulations, supra.

*b. The Respondents' banners contain fraudulent and therefore unprotected coercive speech*

The General Counsel argues on brief at 23 that the banners' language was improper for three reasons. First, the banners without exception failed to name the primary employer with whom Respondent's have their disputes and named only neutral employers. Second, the banners "proclaimed the existence of labor disputes and painted the neutrals as deserving 'shame' from the community due to the dispute." Third, the Respondents deceived the public that they had labor disputes with neutral employers and either explicitly or implicitly requested consumer boycotts of the neutrals. The General Counsel concludes: "This clearly amounted to coercive 'economic retaliation' within the meaning of the Act." The government seeks by characterizing Respondent's communications as fraudulent to defeat any argument that the conduct was constitutionally protected.

The Respondents argue that the General Counsel simply does not understand the Act, which explicitly by its terms makes it clear that a labor dispute may exist with a neutral or secondary employer. Thus they point out that Section 2(9) of the Act defines a "labor dispute" as including ". . . any controversy concerning terms, tenure, or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee." The almost identical provision of the *Norris-LaGuardia Act*, 29 U.S.C. 113(c), has been interpreted as covering "secondary" employers. *Smith's Management Corp. v. f Electrical Workers, Local 357*, 737 F.2d 788 (9th Cir. 1984).

The Respondents further argue that the banners under challenge, which are designed to be displayed to the motoring public, "can hardly be expected to contain more than a pithy, powerful slogan." (R. brief at 10). Thus, the Respondents argue that the absence on the banners of primary and secondary disputant distinctions on which the government seeks to rely are unnecessary and are impractical. Counsel for the Respondents argues further that the handbills available to the public from the banner attendees specify in detail the type and nature of the Respondents' disputes with the various employers and their relationship to one another.

While not determinative of the outcome herein, I agree with counsel for the Respondents who has received the support of recent Federal District Court decisions in this regard, as cited supra, that the banner references to "labor dispute" in association with the names of the neutrals as described above are not fraudulent, but rather, true in the sense that they are consistent with the quoted definitional language of Section 2(9) of the Act. I also find that the fact that the Respondents' agents standing with the banners had handbills available on request, which explained the intricacies of the relationship of the employer and the Respondents, supports the Respondents' arguments here.

4. The Heart of the Case - The Characterization of Banner Displays as Picketing or Other Conduct

*a. Arguments*

As noted above, the use of virtually identical banners by various constituent locals of the United Brotherhood of Carpenters and Joiners of America has produced a series of Section 8(b)(4)(ii)(B) unfair labor practice prosecutions and associated Section 10(l) proceedings in United States District Courts. The results to date: *Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp. 2d 1155 (C.D. CA 2003); *Overstreet v. Carpenters Union Local 1506*, 2003 U.S. Dist. LEXIS 19854 (S.D. CA 2003); and *Benson v. United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498*, Case No. 2:04-CV-00782 PGC (D Utah September 27, 2004), while divided in result, intermediate and not yet resolved in a definitive precedential way, have served admirably to crystallize the heart of the issue in dispute. The cases to date have hinged on the question of whether Respondents' bannering conduct qualifies under Section 8(b)(4)(ii) of the Act as conduct which would "threaten, coerce, or restrain."

The cases cited, supra, have considered and compared the conduct at issue with patrolling pickets, hand billing and the maintenance of a billboard – all occurring with similar language in similar locations. In the three District Court cases, *Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp. 2d 1155 (C.D. CA 2003); *Overstreet v. Carpenters Local 1506*, 2003 U.S. Dist. LEXIS 19854 (S.D. CA 2003); and *Benson v. United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498*, Case No. 2:04-CV-00782 PGC (D. Utah September 27, 2004), and in the ALJ decisions of Judge Kennedy in Southwest Regional Council of Carpenters, et al (Carnigan Construction Company), JD(SF)14-04, and Judge Meyerson in *Southwest Regional Council of Carpenters, et al (New Star General Contractors, Inc.)*, JD(SF) 76-04, the jurists held that the bannering conduct at issue was not directly analogous to patrolling picketing and concluded that under the Court's teachings in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988), the bannering conduct fell outside the reach of Section 8(b)(4)(ii) of the Act.

The distinctions argued by Respondents and noted by various of the cited jurists between traditional picketing and the bannering here are the absence in the bannering instances of patrolling and any elements of exhortation or confrontation by Respondents' agents. Further, they noted the significant differences between the physical appearance of the gigantic banners as compared to diminutive traditional picket signs, as well as the general public message and physical location and orientation of the banners.

Judge Litvack in *Southwest Regional Council of Carpenters (Held Properties)*, JD(SF)24-04 and Judge Parke in *Local Union No. 1827, United Brotherhood of Carpenters And Joiners Of America (United Parcel Service)*, JD(SF)30-03, found the Respondents' conduct herein to be more akin to traditional

picketing<sup>4</sup> which they note the Board views quite broadly. As a result of this finding, each further found the bannerng was violative of Section 8(b)(4)(ii)(B) of the Act.

*b. Analysis and conclusion*

Based on the record as a whole, the stipulations of the parties, the briefs of the parties and the learned analysis and conclusions of the judges in the decisions cited supra, I find that the bannerng under challenge herein differs from traditional picketing in several significant ways. Thus, unlike traditional picketing, no patrolling or exhortation by pickets or confrontation between union agents and employees, customers or employer agents occurred. The Respondents' agents were both relatively unobtrusive behind the oversize banners and were essentially passive.

Further, unlike the traditional language of picket signs urging employees to stop work and/or customers not to patronize, the banners herein simply labeled the identified disputant as shameful. A word derisive perhaps, but not one immediately cognizable as a traditional labor organization picket sign admonition which is easily held to be a threat, coercion or restraint. Additionally, the banners were directed more to and towards the public-at-large than to the employees and/or the on-site customers of the identified entities. Finally the record is totally devoid of any evidence of the impact, if any, of the challenged conduct on the bannered entities customers or employees or any other measure.

From all the above, I find and conclude that the bannerng involved herein is simply not the legal equivalent of picketing for purposes of Section 8(b)(4)(B) analysis. In these regards I am persuaded by and here adopt the conclusion on the same issue of Judge James Kennedy in *Southwest Regional Council of Carpenters, et al (Carnigan Construction Company)*, JD(SF)14-04. There, on similar facts, he held:

I conclude from those facts that bannerng, as described here, is not picketing. Neither is it the functional equivalent of picketing. It is more in the nature of billboard advertising. Had this message been placed on an outdoor billboard, no one could legitimately complain. Had it been stated during a public speech, no one could legitimately complain. Had the accusation been made in a television or radio program, no one could make a valid complaint. (JD slip op. at 16)

Having reached this critical threshold conclusion, I further find and conclude that the bannerng engaged in by the Respondents is not sufficiently akin to traditional picketing that the banners constituted threats, coercion or restraint within the meaning of Section 8(b)(4)(ii) of the Act. Rather I find that to avoid serious constitutional problems as discussed by the Court in *DeBartolo II*, supra, 485 U. S. 568 (1988), the conduct alleged as a violation of the Act in the complaints herein must be held to fall outside the restrictive intentions of Congress encapsulated in Section 8(b)(4)(ii)(B) of the Act. Given that I have concluded that the Respondents' bannerng did not violate Section 8(b)(4)(ii)(B) of the Act, it follows that the Respondent's

have not violated the Act as alleged and the complaints shall be dismissed.

In reaching this determination, I find the issue is subtle and calls out for definitive resolution by higher authority. The decisions of Judge Litvack in *Local Union No. 1827, United Brotherhood of Carpenters And Joiners Of America (United Parcel Service)*, JD(SF)30-03 and Judge Parke in *Southwest Regional Council of Carpenters (Held Properties)*: JD(SF)24-04 correctly note that the Board has tended to view various types of labor organization protest actions as conduct as akin to picketing and does not lightly find such conduct beyond the reach of Section 8(b)(4)(ii)(B) of the Act. The Board's decisions are binding on administrative law judges in unfair labor practices cases including this judge in the instant case. I do not find however that the current Board decisional law definitively resolves the specific issue at hand. And I am very mindful of the teachings of the Court in *DeBartolo II*, supra, that the Board must always review its definitions and analytical approach with a view to avoiding interpretations of the Act which conflict with constitutional prohibitions. Where the distinction between constitutionally protected free speech and regulatable labor organization conduct is subtle, the recent precedents divided and the matter not as yet resolved by higher authority, special cautions must be applied by all judges, including administrative law judges, so as to avoid applying unsettled law in such a way as to improperly restrict constitutionally protected conduct.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Charging Parties are, and each has been at all times material, a employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondents are, and each has been at all relevant times, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents did not violate the Act as alleged in the complaint and the complaints shall be dismissed in its entirety.

ORDER

On these findings of fact and conclusions of law, and on the basis of the entire record, I issue the following recommended<sup>4</sup>

The allegations of the complaints, and each of them, shall be and they hereby are dismissed in their entirety.

Dated, San Francisco, California, January 6, 2005.

<sup>3</sup> The Court in *DeBartolo II*, supra, distinguished the peaceful hand billing under consideration therein from picketing. (485 U.S. at 571.)

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.