Southwest Regional Council of Carpenters and Carpenters Local No. 209, United Brotherhood of Carpenters and Joiners of America *and* Carignan Construction Company and Carpenters Local No. 209, United Brotherhood of Carpenters and Joiners of America *and* Shea Properties, LLC. Cases 31–CC–2113 and 31–CC–2114 (Formerly 21–CC–3326)

September 30, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

This case concerns whether the Respondent 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.[1] The judge found that these banner displays did not violate Section 8(b)(4)(ii)(B) 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 lawful in our recent decisions in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010); *Carpenters Local 1506 (Associated General Contractors of America*), 355 NLRB No. 191 (September 22, 2010); and *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (September 30, 2010). Accordingly, for the reasons stated in those decisions, 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.

[1] On February 18, 2004, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and Charging Party Shea Properties, LLC filed exceptions and supporting briefs, and the Respondents filed an answering brief.

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

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The bannering 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 bannering involves the placement of union agents holding large banners proximate to the premises of neutral 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 bannering 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 bannering 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

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

Katherine Braun Mankin, for the General Counsel.
Gerald V. Selvo (DeCarlo, Connor & Selvo), of Los Angeles, California, for the Respondent.
Mark T. Bennett (Merrill, Schultz & Wolds, Ltd), of San Diego, California, for Charging Party Shea Properties, LLC

DECISION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Los Angeles, California, on September 23–24, 2003,[1] based upon separate complaints consolidated on August 29. The Acting Regional Director for Region 31 issued the complaint in Case 31–CC–2113 on August 8 (amended August 12), based upon an unfair labor practice charge filed June 16 by Carignan Construction Company (amended July 21). The Acting Regional Director for Region 21 issued the complaint in Case 31–CC–2114 on August 27, based upon an unfair labor

[1] All dates are 2003, unless otherwise stated.

practice charge filed by Shea Properties, LLC., on July 21. It was subsequently transferred to Region 31 for hearing and given its current docket number. In general, the complaints allege that Respondents' bannering activities have violated § 8(b)(4)(ii)(B) of the Act, the ban on threatening or coercing neutral employers and other persons in labor disputes not their own.[2] The Respondents assert the activities are privileged as free speech under both the First Amendment of the United States Constitution and the publicity proviso found in § 8(b)(4).

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue and to file briefs. The General Counsel, Charging Party Shea Properties, and Respondent have all filed briefs which have been carefully considered. Based upon the entire record of the case, including a formal stipulation of facts, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The stipulation establishes that the entities involved in these disputes are all employers who meet the Board's nonretail standards for the assertion of jurisdiction. They are all engaged in commerce as each of them purchases products from outside the state in excess of $50,000. Thus each of them is an employer or person engaged in commerce within the meaning of § 2(1), (2), (6), and (7) of the Act. Furthermore, the stipulation establishes that both Respondents, are labor organizations within the meaning of § 2(5) of the Act.

II. INTRODUCTION

The facts are not in significant dispute, although the General Counsel has presented some testimony said to be proof of the unlawful objective. Insofar as the bannering itself is concerned, the stipulation describes those incidents.

In essence there are two primary disputes. The first is Local 209's dispute with M&M Interiors, a nonunion subcontractor performing steel stud and drywall services at an auto mall construction project in Thousand Oaks. There, the owner of several auto dealerships, Silver Star Motor Company, had hired a general contractor, Carignan Construction, to build and/or remodel two of its businesses at the auto mall, the Cadillac and Saab dealerships. Carignan had arranged for M&M to install steel studs and to attach the wallboard.

The second dispute, ranging from San Diego to Los Angeles/Pasadena, was between Local 209 and another nonunion contractor, Covi Concrete, Inc. Covi had been, was believed to have been, or was being considered as, the concrete installer on a number of projects. It had been hired or was believed to have been hired by various property developers or construction managers, including Shea Properties, LLC., Capital & Counties, USA, Inc.,[3] Wermers Multifamily Corp., and 621 Associates, Inc. In addition, Shea Homes was providing consulting services to the Worldwide Church of God at its Ambassador College campus in Pasadena. The record does not clearly disclose what relationship Shea Homes has to Shea Properties although they both appear to be part of the same family of companies.

In each case, Local 209 and the Southwest Council are opposed to the use of nonunion contractors who, they say, fail to pay their employees on construction projects wages and benefits equal to the area standards as negotiated under the Southwest Council master collective-bargaining agreement. Local 209 and the Southwest Council have chosen to voice their objections in a manner that focuses on the contracting authority, such as a project owner, a general contractor hired by the owner or, where such an entity exists, a professional project manager. (Professional project managers are usually under the direct control of a project owner and are sometimes responsible for choosing various contractors, a task typically performed by the lead contractor, frequently known as the general, or the prime, contractor. Unlike general contractors, project managers usually perform no construction work with their own employees.)

A subsidiary issue raised by the complaint is whether the Southwest Council is responsible for the bannering at the Thousand Oaks dealerships. The Council admits that it, together with Local 209, has a primary dispute with M&M. Furthermore there is evidence that a Council official, business representative Patrick Stewart, supervised the bannering at that location. Nevertheless, the Council asserts that it is not legally responsible for the bannering; if any entity is legally responsible, it is Local 209. Carignan's Thousand Oaks complaint also alleges that the two Unions' conduct constitutes "signal picketing" and that it is unprotected, "fraudulent" speech. Those allegations are not found in the Shea Properties complaint, though the facts closely track those seen in the other.

III. THE DOCUMENTARY EVIDENCE

The complained of conduct was preceded both by letters and visits from union officials. Charging Party Shea properties presented a package of letters written by Hal Jensen a Local 209 business agent, on June 27 to a number of construction employers. The record is silent with regard to whether Jensen sent similar letters concerning the Thousand Oaks project. Nonetheless, the letters are informative regarding the two Unions' purpose. The letters are virtually identical, except for the substitution of the names of different neutrals and different primaries.

The following is an exemplar written on June 27 to the H. G. Fenton Company and reads, in pertinent part:

> It has come to our attention that general contractor Wermers Construction [a neutral] may be currently bidding on one or more of your upcoming projects. Please be informed that Carpenters Local 209 has a labor dispute with several subcontractors employed by Wermers both in the past and currently, including Covi Concrete [the primary]. These subcontractors do not meet area labor standards—they do not pay prevailing

[2] Although both § 8(b)(4)(i) and (ii) conduct are commonly seen together, there is no allegation here that the Respondents' conduct violated § 8(b)(4)(i). That portion of the statute prohibits labor unions from inducing and encouraging neutral employees to engage in proscribed strikes.

[3] Capital & Counties is a large California property developer headquartered in San Francisco.

wages to all their employees, including fully paying for health benefits and pension.

. . . .

. . . we are asking that you use your managerial discretion to not use Wermers as a general contractor unless all their carpentry craft subs generally meet area labor standards for carpentry work.

We want you to be aware that our new and aggressive public information campaign will encompass all parties associated with projects where Wermers Construction is involved and carpentry subs who do not meet area labor standards are employed. That campaign will include highly visible lawful banner displays and distribution of handbills at the jobsite and premises of property owners, developers, and other involved firms. 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.

Later, when the bannering actually began, the banner bearers carried flyers for distribution to passersby who sought further information. These, too, are virtually identical except for substituting different neutrals as appropriate to the situs of the bannering.

The flyer begins with a headline: "Shea Properties. For Desecration of the American Way of Life." The headline is followed by the drawn figure of a rat eating an American flag. The text following that drawing reads:

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 Shea properties for contributing to erosion of area standards for Carpenter craft workers. Covi Concrete is a sub contractor for general contractor Wermers on Shea Properties and Capital & Counties mixed-use project located in the City of Pasadena. 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 wage employers like Covi working in the community. In our opinion the community ends up paying the tab for employee health care and low wages tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 209 believes that Shea Properties has an obligation to the community to see that area labor 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 TELL SHEA PROPERTIES THAT YOU WANT THEM TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK ON THEIR PROJECTS.

Finally, there is evidence that Southwest Council representatives visited the sites where bannering was occurring, or was about to occur. The employers collected the business cards of at least 11 business representatives or special representatives. These may be found in General Counsel Exhibits 6 and 7.[4] These cards include the names of Patrick Stewart, Chuck Elkins, and Bill Baxter.[5] There is testimony regarding statements made by these three which will be discussed below. On at least one of the business cards distributed by special representative Doug McMurray someone has written the phrase "call Hal Jensen." That card bears a June 2 date. Jensen is the same individual who signed the exemplar letter quoted supra, signing it as a Local 209 business representative.

IV. THE BANNERING

In each of the locations, Local 209 established banners near the sites which, by design, named the companies with which the primary disputants were doing business. In secondary boycott terms, it chose to name the neutrals, not the primaries. These banners were some 20 feet long and 4 feet high. Two or three individuals held them in a stationary manner near the construction sites or the putative construction sites. They did not engage in any patrolling, a traditional feature of picketing; in fact, the banner was so large as to have rendered patrolling physically challenging. Those individuals also carried leaflets that described the nature of Local 209's dispute with the named neutral, either M&M or Covi. There is no evidence that the pickets said anything to passersby about Local 209's purpose except to hand out the leaflet.

The banners were white and said in large red lettering, about two feet high, "Shame on (name of neutral)." That phrase was bounded on the left and right margins by the smaller, slanted, phrase, "Labor Dispute" in black letters. Neither M&M nor Covi is mentioned on the banner in any way. The banners were displayed at the Auto Mall beginning June 2, and at the various Covi locations beginning July 17. The bannering was continuing at the time of the instant hearing in September.

More specifically, the facts at each site are:

The Auto Mall in Thousand Oaks

Aware of a possible labor dispute, Silver Star and Carignan created a reserve gate solely for the use of M&M. They informed the union of the reserve gate by faxed letter on May 13. On June 2, Local 209 placed its banner on the public sidewalk, about 180 feet from the reserve gate. The banner is approximately 60 feet from the nearby freeway boundary and is visible to all northbound freeway users. The banner is almost 200 feet from the project's construction entrance; is 200 feet from Carignan's trailer; 240 feet from the customer entrance; 150 feet from the sidewalk entrance; and 100 feet from Silver Star's temporary office trailer. The photographs show the banner to be on a street corner facing street traffic. It is clearly aimed at the general public.

[4] Additional business cards may be seen in C.P. Exh. 3, but they are duplicative.

[5] Some of the witnesses mistakenly identified Baxter as Business Representative Robert Almond. The error was corrected by stipulation.

The bannering has continued, through at least the date of this hearing, even though M&M has long since left the jobsite and even though the union has been informed of their departure.

In this incident, although Local 209 is the local union carrying out the bannering, the actual union official in charge was one of Respondent Southwest Council's business representatives, Patrick Stewart. Because of Stewart's involvement, the complaint was directed both at Local 209 and the Southwest Council.

The Shea Sites

Although I have grouped the following bannering incidents under the heading "Shea Sites," in fact not all of them involve Shea directly, although each is covered in the Shea complaint. As will be seen, it was enough for Local 209 to have believed that Shea, or one of the Shea entities, might become involved in a specific project. Where that was so, neutrals other than Shea were named on some of the banners. The others who were named are Capital & Counties USA and Wermers Multifamily Corporation.

The Shea Properties Office. The stipulation recites that Shea Properties, which is a Delaware corporation, has an office in Aliso Viejo, a town in Orange County. Its business is to build, manage, and sell commercial real estate and apartments in Southern California. As will be seen below, one of its projects was the construction and subsequent leasing of the City Lights apartment complex, also in Aliso Viejo.

According to the stipulation, about July 17 and for 3 days thereafter, Local 209 displayed a 20-foot long white banner with two foot high red capital letters stating "SHAME ON SHEA PROPERTIES." That phrase was bounded on each side in smaller black lettering by the words "LABOR DISPUTE." The banner was displayed from 10 a.m. to 3 p.m. and was accompanied by three individuals who were either members of or employed by Local 209. A diagram shows the banner to have been placed on a public sidewalk bordering Aliso Viejo Parkway, facing the street. It was located next to the entrance to a large parking lot fronting the office building in which Shea Properties had its business office. The banner was 200 feet from the building's entrance.

Shea Properties' City Lights Apartment Complex. After 3 days the banner was relocated to the City Lights complex and since that time has been displayed on Tuesdays through Fridays from approximately 10 a.m. to 3 p.m. It, too, was accompanied by three individuals who were either members of or employed by Local 209. There, the banner, as shown by a diagram and photographs, was placed on a sidewalk next to the complex's entrance, facing Horizon Street. The sign was placed at an angle so that it was directed both at the driveway and street traffic. While the distance to the nearest complex building (the recreation building, housing the leasing office), is not covered by the stipulation, the photograph shows the building to be immediately behind the banner beyond a grass strip and decorative fountain. Another photo shows the banner in a slightly different location, still in front of the same building, but perhaps 20 feet away from the parking entrance. In that location it faced out to the street. These locations placed the banner from between 60 to 100 feet from the leasing office.

No construction was underway at the City Lights complex. There, Shea Properties was principally performing property management and apartment leasing.

Wermer's Multifamily Corporation office. The Wermer's office is located in northern San Diego, not far from the Miramar Marine Corps Air Station. The stipulation recites that beginning on July 17, and continuing, Local 209 placed a "SHAME ON WERMERS" banner at the office and that it appears Tuesdays through Fridays from 9 a.m. to 3 p.m. The stipulation states that the banner is 30–40 yards from the front entrance to the building, next to the building driveway leading to the parking lot. Its employees, customers, tenants, and visitors all use the driveway and lot. Located in a park-like setting, its building is, in the words of the stipulation, 'surrounded by other office buildings,' although the photographs do not show them. The building itself seems to be 'surrounded' by grass and trees.

Capital & Counties USA (Los Angeles). The stipulation recites that Capital & Counties has an ownership interest in the office building located at 800 West Sixth Street in downtown Los Angeles.[6] This is a large office building located on the southeast corner of the intersection of South Flower Street and West Sixth. It has many tenants. The building's sidewalk entrance is in the corner abutting the intersection. To enter the building at that location from Flower, one must walk up six or seven steps to an outdoor lobby or plaza.[7] An espresso coffee outlet is located there. Passing through the plaza, one must then take an escalator to the main lobby on the second floor. The building also has an underground parking garage. The single garage entrance is on Flower Street about 60–70 feet south of the intersection. Once parked in the garage, a visitor or tenant may enter the building directly, probably by elevator, without coming outside.

The stipulation recites that since July 17 and continuing, Local 209 has placed a SHAME ON CAPITAL COUNTIES banner, having the same format as the others. It is displayed at least on Tuesdays through Fridays. It has been placed on the curb of the Flower Street sidewalk, about 15 feet (the width of the sidewalk) from the steps to the entry plaza. That location places it about 40 feet from the garage entrance. Three members or employees of Local 209 accompany the banner. Sidewalk passersby can only see the back of the banner, though persons on the other side of Flower or across the intersection can see the front. It is, of course, visible to drivers on Flower, including those heading to the garage entrance, but probably not from Sixth, since it is a one-way eastbound street and the building would shield the banner from those drivers.[8]

There is no construction occurring at this office building.

Capital & Counties USA Colorado Boulevard site (Pasadena). The hearing record regarding the ownership and con-

[6] There is testimony from the building manager, Denise La Doux, who works for Charles Dunn Real Estate Services, Inc., the managing agency, that Capital & Counties is a silent partner in the building and that the managing partner is an entity she referred to as "Waltco."

[7] There is also a level entry to the plaza from the Sixth Street side of the corner.

[8] The only complaints received about the banner came from drivers exiting the garage who said the banner hampered their ability to see oncoming traffic.

struction interests on the property in question is a bit unclear. The city block having its northeast corner at the intersection of Colorado Boulevard and Madison Avenue is the site of some significant construction. On the corner itself is an historic 8-story bank building, once the site of the First Trust Bank. At the time of the bannering it had become the Bank of the West. At some point, Capital & Counties appears to have acquired an ownership interest in that building. To the north, on Madison Avenue is a historic parking structure and much of the remainder of that block is under construction. That project is the site of the Trio Apartments. An entity known as 621 Associates is the owner-developer of that project.

Duane Bradley, the senior development manager for Shea Properties testified about the Trio project interests. He said, "Capital & Counties, through another entity called 525 Colorado Associates, is partners with I believe it's called Shea Trio Pasadena Associates that those two entities comprise the ownership entity for the Trio project, which is 621 Colorado Boulevard Associates." He observed that Shea Properties is the managing partner of Shea Trio Partners. Moreover, Wermer's has been assigned the task of being the construction manager for the project. Wermer's has two management officials on the site, Sheila Manning and Brian Cazares. Manning is the project coordinator and Cazares is the senior project manager.

Manning testified that in May, a union official she believed to be Robert Almond (it was actually Bill Baxter) and another came to the construction trailer. After some issues about using the restroom, one of them asked her if the concrete contractor had been chosen for the project. She said one had not, also noting it was not up to Wermer's to decide. One of the men asked who would be making the decision and she replied, "Shea Properties." She said he told her, ". . . he wanted to get a message to Shea that the Carpenters Union would like a union carpenter to do the concrete portion of the project. He proceeded to inform me that what took place at the City Lights project was child's play compared to what would take place at Trio if a non-union carpenter contractor was chosen." She quotes him as going on to say: "he continued to say that Wermers would feel pain if a non-union contractor was chosen on site." She also said that the Union did not want Covi Concrete to be doing the project. (If this conversation occurred in May, it would not have been in reference to the July bannering at City Lights.)

Cazares testified that sometime between mid-April and June, Almond (actually Bill Baxter) and Chuck Elkins came to the jobsite trailer and were in the process of speaking to Manning and asking who was in charge. He overheard their request and came out to tell them it was he. They asked who was bidding the concrete and Cazares replied that the bid hadn't been released yet, so he couldn't say. When they asked who the likely bidders would be he listed six, including Covi Concrete. Almond responded saying Covi would not be a good choice. Cazares testified Almond said:

> . . . there was an ongoing labor dispute with Covi Concrete for not reaching fair area standards, labor standards and pay and fringe benefits and stuff like that. So I, you know, I told them that they are not the only non-union bidder on the list, although my list was stronger with union bidders, and we talked further about it and he told me that, again, how could he get a message to whoever the powers that be that make the decision—who's going to make the decision on the contract, which he thought it was us, and I told him it's not us, it's Shea Properties. So I went through the whole process with him on how we're the construction manager, we get the bids and we qualify them, and then we give them to Shea Properties and no—in kind of a random list with their numbers and their bids and their insurance qualifications and then Shea Properties picks the contractor and I told them about that process.
>
> . . . .
>
> What he said, to the best of my knowledge, you know, that I can remember, he said that, you know, to get a message to either of the—the powers that be who makes the decisions that, if, you know, we chose Covi Concrete for this scope of work on the project, that he would make—that they would make the lives of everyone on this project miserable.

In mid-June, Shea Properties chose Covi Concrete for the work. On June 20, Almond and Elkins visited the site to see where the concrete situation stood. Cazares says he told them of Covi's selection at that time. Cazares testified Almond, clearly perturbed, said, ". . . that 'was a bad choice.' He goes, you know, 'moving forward all hell's going to break loose on this project.' Cazares went on to testify that Almond then mentioned the City Lights project, saying "what they had done out there in regards to, you know, bannering [at City Lights],[9] that it would be dwarfed by what's going to happen at Trio." Once again, since this conversation occurred on June 20, it preceded the Shea bannering in Aliso Viejo which according to the stipulation did not begin until July 17.

The stipulation recites that on July 17, Local 209 placed a "SHAME ON CAPITAL COUNTIES" banner in front of the bank building. The banner contained the slanted "Labor Dispute" language seen on the other banners. The banner did not mention Shea, Wermers or the Trio project immediately behind the bank. The banner itself was placed at curbside fronting Colorado Boulevard adjacent to the Madison Avenue stoplight/streetlight pole at the crosswalk. This location placed it out of view for anyone working at or visiting the Shea/Wermers jobsite trailer half a block up Madison or the Trio project itself. It was aimed only at vehicles passing through the intersection or persons using the crosswalk. This banner, too, is being displayed Tuesdays through Fridays from 10 a.m. to 3 p.m., and is held upright by banner bearers.

Ambassador College Campus. The Ambassador College Campus in Pasadena is the headquarters of the Worldwide Church of God. The main building appears to occupy a city block. Its entrance is on Green Street. The Church owns a large parcel of land and is in the process of selling it to developers. To assist it, it has hired as a consultant Shea Homes. Shea Homes has a connection to Shea Properties, but the connection is not clearly described in the record. According to Shea Homes' assistant community development manager, Brian Riggs, Shea Homes is:

[9] Bracketed material corrects unintelligible transcription.

> serving as a consultant to the Worldwide Church of God. The property is presently not entitled. We are seeking approvals through the city to get it approved to sell off to other builders and so my job consists of design with architects, consultants, designers, meeting with the Worldwide Church of God, since they are the property owners. So we have meetings with them regularly. We have meetings with a number of other consultants that we work with. PR firm, traffic engineer. So it's planning and designing of this future community.

He said current plans call for this planned community to consist of 1431 residential dwellings. As the consultant to the Church, Shea Homes has established an office in one of the campus buildings. The project itself, at the time of the hearing, was some time in the future. No approvals had then been granted and no construction was underway. Indeed, the property had yet to be transferred to the developers. Riggs said Shea Homes hoped to be one of the successful purchasers of part of the property, but it would have to bid like any other developer.

Riggs recalled that sometime in early July, two union business agents, Harry Beggs and Ron Diament, came to his office. He took their business cards, but did not really learn which was which. They asked if he was familiar with Covi Concrete. Riggs replied he was not. They asked if he was familiar with a labor dispute the Carpenters Union had with Covi and Shea Properties. Riggs said he had heard of it, but didn't really know about it; he had heard something about the occurrences at the Trio Apartments project, but knew nothing about any other projects. They asked if Shea Homes and Shea Properties were affiliated. Riggs replied that both had the same owners, but they sold different products and were separate legal entities. At that point one of the union officials said that the Union saw it differently and he could expect some banners soon.

The stipulation recites that on July 21, Local 209 placed a "SHEA PROPERTIES" banner facing Green Street in front of the Ambassador College campus. For the first 4 days, the banner was located about 60 feet from the main building. Beginning July 21, the banner was moved further west to its current location, about 100 feet beyond the original spot.

Once stationed for the day, there is no evidence that the banners at any of the sites were moved in any fashion. Thus, it is fair to conclude that these banners do not include the element of patrolling, an expected characteristic of picketing. Furthermore, there is no evidence that the banner bearers said anything whatsoever to passersby. Their speech was minimal and apparently limited to whatever niceties might be uttered when handing a flyer to someone who had requested it. Finally, there is no evidence whatsoever, beyond the bannering itself, that any attempt was made to induce workers to refuse to perform their normal work. Hence, it is fair to conclude that no work, whether within or without any of the sites, was disrupted.

Analysis and Conclusions

This complaint alleges a limited violation of § 8(b)(4)(B), the secondary boycott prohibition of the Taft-Hartley Act. Generally speaking, that statute prohibits labor unions from enmeshing persons in labor disputes not their own. It has been observed that sometimes determining whether a person is a primary disputant or a secondary disputant (neutral) is a difficult task.[10] Rules and presumptions have been established over the years to assist in making that determination.[11] Moreover, the Congress, recognizing that nearly all primary disputes are likely to have secondary effects, attempted to strike a balance between free speech and misconduct, by including the so-called publicity proviso.

The pertinent portion of the statute is set forth below. As can be seen, the statute approaches these kinds of disputes by determining the object of the picketing or other conduct, not strictly because of its effect upon persons. Moreover, the Congress, through another proviso, has recognized that labor unions are entitled to engage in a traditional primary strike; i.e., a strike against the person with whom it actually has a dispute and the person who can actually resolve the disagreement.

The statute itself, broken down here for easier comprehension, reads as follows:

> Sec. 8(b)(4). It shall be an unfair labor practice for a labor organization or its agents—
>
> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) [omitted]
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]:
>
> (C) [omitted]
>
> (D) [omitted]
>
> [First proviso] *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;[12]

[10] *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 645 (1967).

[11] See, for example, *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), which establishes certain presumptions where picketing occurs at a common situs.

[12] Indeed, the right to engage in a primary strike is specifically preserved in Sec. 13 of the Act: "[Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any

> [Second proviso] *Provided*, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]:
>
> [Third proviso] *Provided further*, That for the purposes 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, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . . .

The instant complaint has been deliberately restricted by the omission of the (i) inducement language. Thus the General Counsel has chosen to concede that the conduct here was not aimed at inducing or encouraging employees to cease work. Instead, the complaint focuses solely on union conduct which "threatens, coerces or restrains" persons engaged in commerce. Furthermore, in whatever form it takes, the threat, coercion or restraint, must have, as one of its objects, forcing a neutral to cease doing business with a primary.

And, assuming such an object exists, that conduct may nevertheless be permitted if it meets the criteria set forth in the third, or publicity, proviso recited above, i.e., if the conduct is other than picketing and it truthfully advises the public, consumers or union members, that there is a primary dispute and if the conduct does not have the effect of inducing individuals employed by neutral employers to not perform their work at their own establishment.

Beyond that, since Respondents have, in their banners, invoked the expression "labor dispute," it is appropriate to note that § 2(9) of the Act defines that term. It states: "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee*."[13]

I have italicized the last portion of the definition to note that it encompasses not only primary disputants but others who stand at some distance from the primary disputants—that is, neutrals or secondaries, as contemplated under § 8(b)(4)(B).

Due to the stipulation the facts here require little parsing to determine what the various relationships are. First, the primary disputant in the Thousand Oaks bannering is M&M Interiors. There, Carignan Construction, a neutral who does business with M&M is not even named on the banner. Instead, the neutral project owner, Silver Star (the Cadillac and Saab dealer), is named. That company is one step further away from the controversy than the general contractor, Carignan.

Similarly, the Shea Properties–Capital & Counties–Wermer's bannering is occurring some distance away from the designated primary, Covi Concrete. Two of those locations occurred at company office buildings where no construction was even contemplated, much less occurring. One of those was the Wermer's headquarters office in San Diego. The other was at the downtown Los Angeles office building partly owned by Capital & Counties, though the record does not reflect whether Capital & Counties has offices there. Others in almost the same category are the Ambassador College (in Pasadena) and the City Lights Apartment complex (in Aliso Viejo). At Ambassador College, Shea Homes (not Shea Properties) only has a planning office. At none of these sites is construction actually in progress.

It would appear that the Trio Apartments in Pasadena is the principal project with which Local 209 has its issues. It is there that Covi Concrete actually made an appearance. (The record is not clear whether Covi had anything to do with the construction of City Lights, though it seems likely.) In any event, Shea Properties and Capital & Counties are partners in the Trio project. It can be said that Local 209 is treating Shea Properties and Capital & Counties as if they were the same.

All of the named neutrals are uninvolved with 209's dispute with Covi or M&M. Their only connection to that dispute is indirect. It is possible that as project owners they have some influence over the selection of the primary employer. Silver Star could ask (but probably not require) Carignan not to use M&M as a subcontractor. Similarly, Wermer's and Shea Homes could ask, but probably not require, Shea Properties and/or Capital & Counties not to use Covi Concrete. At the Trio project, as partners in 621 Associates, Shea Properties and Capital & Counties themselves could actually decide who to use as the concrete supplier. There, they were only one step from the primary and held the decision-making power to avoid recrimination simply by exercising their own discretion in a way which would satisfy Local 209's concerns. And, I suppose, such a decision would have resulted in no bannering of the sites more distant, such as the office buildings and the City Lights Apartments.

The first legal question to be answered is whether the publicity proviso is applicable to the bannering here. Both Respondents argue that the proviso fully permits the conduct. They note that there was no patrolling as normally seen in picket lines; the banners do not look like picket signs and they were not placed in locations likely to have an effect on persons seeking entry to those facilities where construction projects were actually underway. Instead, the banners are more like billboards—they are stationary and aimed at the general public. Moreover, their message is unlike those seen on picket lines. Picket line messages include phrases such as "On Strike," "Unfair," "Non-Union," "Doesn't Meet Area Standards," and the like. This message simply says "Shame On [name of neutral]"

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way the right to strike or to affect the limitations or qualifications on that right.

[13] Sec. 2(9) of the NLRA was lifted verbatim from § 13(c) of the Norris-LaGuardia Act (1932).

while adding the phrase "Labor Dispute."

The General Counsel asserts that there is no labor dispute at any of the sites and therefore the message is false (and even 'fraudulent,' though I am unclear how 'fraudulent' is an accurate characterization[14] or how it adds anything to the legal argument.) Nonetheless, it is appropriate to observe that the "labor dispute" language is not false. In actuality, it is a true statement. Local 209 and the Council do have labor disputes with M&M and Covi which are ongoing. Yet the § 2(9) definition of labor dispute specifically includes both primaries and neutrals as persons who are involved in a labor dispute. This is, of course, as it should be. Whenever there is a labor dispute, both primaries and secondaries will be affected to some degree. The primary, of course, is the main target. Yet, secondaries can be directly, indirectly, or only incidentally affected. Nonetheless they are parties to any labor dispute as defined by § 2(9). Therefore, the General Counsel's charge that the banners are false when they announce "labor dispute" is inconsistent with the statutory definition.[15] Certainly the publicity proviso permits truthful speech.

Before attempting to apply the publicity proviso to the facts occurring here, it is appropriate to look to the legislative history of the proviso and some Supreme Court discussions both leading to the proviso and occurring subsequently. In fact, the discussion must begin with a Supreme Court case decided before the publicity proviso was added to the Act in 1959, *Electrical Workers Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 694 (1951).[16] That case discussed the secondary boycott prohibitions as established by the Taft–Hartley Act in 1947. The statute as originally written, then § 8(b)(4)(A), utilized the phrase "induce or encourage" as the test for whether a union was engaging in prohibited activity. In *Langer,* the court held that the phrase found in § 8(b)(4)(A) "induce or encourage" was broad enough to include "every form of influence or persuasion" upon neutral employees to obtain their work stoppage. Id. at 701.

When the 1959 amendments were being considered, the original House version would have prohibited publicity as well as picketing in secondary situations. Certainly, the *Langer* decision would have permitted such an interpretation.

Some pre-1959 cases seem to have followed that model, but the courts uniformly rejected that type of analysis. See, for example, *United Warehouse & Wholesale Employees Local 261 v. NLRB (Perfection Mattress & Spring Co.)*, 282 F.2d 824 (D.C. Cir. (1960); *NLRB v. Brewery Workers (Adolph Coors Co.)*, 272 F.2d 817 (5th Cir. 1959); *NLRB v. Business Machine & Office Appliance Mechanics Conference Board (Royal Typewriter Co.)*, 228 F.2d 553 (2d Cir. 1955), cert. denied 351 U.S. 962 (1956). Shortcomings were also found regarding direct contact with the neutral employer's management. See the discussion by Justice Brennan in *NLRB v. Servette, Inc.*, 377 U.S. 46, 53–54 (1964). As a result, the 1959 amendments were the product of a joint conference between the House and the Senate. Senator Kennedy was the conference committee chairman and Senator Goldwater was one of the participants. During the debate, Senator Kennedy stated concerning the proviso:

> **The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.**
>
> Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. *In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having an ambulatory picketing in front of a secondary site.* (Emphasis supplied.)[17]

On September 14, the day the Act was signed into law by the President, Senator Goldwater inserted in the Congressional Record his analysis of the amendments in which he said of the publicity proviso:

> This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B, subject to certain restrictions imposed by the Board. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute. But even this permitted—but limited—type of union activity becomes unlawful if such publicity has an ef-

[14] For a statement to be legally fraudulent, it must be uttered by a person who knows the statement is false, that the person intends the listener to rely upon it, and the listener in fact does so and that very reliance results in a foreseeable detriment to the listener. None of these requirements of fraud has been demonstrated here.

[15] There are, of course, cases which hold, quite logically, that if language on a picket sign is untrue, that falsity is evidence that the picket line has a purpose other than its claimed purpose. This is important in determining the object of the picketing. For example, if a sign asserts that the employer is not meeting area standards, when in fact it does, then an inference may be drawn that the picketing has another purpose, (e.g., recognitional, work assignment), perhaps barred by § 8(b)(7) or § 8(b)(4)(B), (C), or (D). See, for example, *Hotel, Motel & Club Employees, Local 568 (Restaurant Management)*, 147 NLRB 1060 (1964); *Service Employees Local 87 (Trinity Building Maintenance)*, 312 NLRB 715 (1993).

[16] As an aside, *Langer* and the more famous *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951) were decided the same day.

[17] II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1432.

> fect of inducing any individual employed by any person other than the producer, company A, in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the secondary employer who is engaged in such distribution, that is, the distributor, company B.[18]

In addition, Senator Douglas on that day inserted in the Congressional Record, a speech he had made a week earlier to a state AFL–CIO convention describing the 1959 amendments. With regard to the publicity proviso he said:

> While picketing at secondary-boycott site is outlawed, the House bill went further and would even have prevented the passing out of handbills or ads in newspapers. This provision in the House bill was changed so that handbills, radio programs, advertisements, etc., aimed at the public, including consumers, would at least be permitted in the secondary situations. I think that is proper and an exercise of our constitutional right of free speech.[19]

The sum of these remarks is a remarkably clear legislative intention to permit unions in a small way to engage in at least one kind of secondary activity, publicity. Moreover, the proviso specifically states that a union engaged in a secondary publicity campaign may publicize it not only to the general public but also to "consumers and members of a labor organization."

Of course the proviso is self-limiting. It will not protect publicity from the secondary boycott prohibitions if the publicity has the effect of causing employees of neutrals to refuse to work. In a very real sense the inducement language now found in § 8(b)(4)(i) resurfaces within the proviso under the "effect" analysis. Obviously, if the publicity has the effect of inducing neutral employees from working, the effect is proof that publicity alone was not the purpose; the purpose included a call for action. While the reasoning may be circular in a sense, it is nonetheless the balance Congress struck. It allows for free speech up to the point it becomes a call for action. Such a balance is also seen in the publicity proviso to § 8(b)(7)(C), the prohibition against prolonged recognitional picketing. In this regard, *Local Joint Exec. Bd. Hotel Workers (Crown Cafeteria)*, 135 NLRB 1183 (1962) [*Crown II*] (adopting the Jenkins/Fanning dissent in *Crown I*, 130 NLRB 570, at 574ff. (1961)] and *Hod Carriers Local 840 (C. A. Blinne Construction)*, 135 NLRB 1153 (1962) are instructive. They hold that a union may have an unlawful purpose but if the picket sign language comports with the statute, the publicity proviso will permit the picketing.

The complaint here, as noted, invokes § 8(b)(4)(ii)(B), not § 8(b)(4)(i)(B). Seemingly that discards any theory that employee inducement is a part of the case. However, it has long been held that (i) inducement of neutral employees qualifies as (ii) restraint and coercion of a neutral employer. *Food & Commercial Workers (Carpenters Health & Welfare Fund)*, 334 NLRB 507 (2001); *Teamsters Local 315 (Santa Fe)*, 306 NLRB 616, 631 (1992); *Plumbers Local 398 (Robbins Plumbing)*, 261 NLRB 482, 487 (1982); *Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 254 fn. 6 (1972). Therefore, no matter what the truncation of the complaint's allegation is intended to mean, both (i) and (ii) conduct are implicated. For that reason, evidence of employee inducement must be considered even if a remedy can only run to (ii) conduct. It is worth noting, therefore, that there is no evidence whatsoever of (i) employee inducement independent of the banners. The absence of such evidence is significant in determining the Respondents' object.

The record does contain testimony from two Wermer's managers that Union Agent Baxter made remarks in the months before the bannering that seem to qualify as (ii) threats. These include remarks such as "what's happened in the past will seem like child's play," "Wermers will feel pain," "we will make the lives of everyone on the project miserable," and "all hell's going to break loose."

I am unable to find that these remarks qualify as threats, restraint or coercion as contemplated by (ii). On their face they are hyperbole and must be taken as such. But, they are defective in another way. Most refer in the past tense to events which hadn't yet occurred. For example, Manning quotes Baxter as referring in May to matters at City Lights that did not occur until July. If she is accurately referring to some other incident that had occurred prior to May, the record does not reflect what it was. Moreover, if she is honestly doing so, there is no way to evaluate it here. I can only conclude in that circumstance that there is insufficient proof to determine whether in context Baxter's supposed reference was coercive. It may well be that Baxter was referring to lawful past conduct of some kind. Because of its context, such a reference would render the remarks inoffensive. The same can be said of Cazares' testimony. Accordingly, I cannot find these remarks to be (ii) conduct.

While it may be observed that the proscriptive language of § 8(b)(4)(B) contains no language specifically speaking to picketing (because its injunction reaches conduct beyond simple picketing), the publicity proviso clearly does, not only by its wording but by the intent of its framers. Therefore, the threshold publicity proviso question is whether the bannering is picketing. The General Counsel seems relatively unconcerned with the question. It simply assumes that persons standing with signs are pickets.

Indeed, it argues that the bannering is "signal picketing," although I am uncertain how to take that assertion. All picketing may fairly be said to constitute some kind of "signal." As the Supreme Court observed in *Local 761, Electrical, Radio & Machine Workers v. NLRB (General Electric)*, 366 U.S. 667, 674 (1961):

> Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success. [Citation omitted.] But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse

[18] Op. cit. at 1857.
[19] Op. cit. at 1834.

> to deal with the struck employer. *Labor Board v. International Rice Milling*, [341 U.S. 665 (1951)]. [Internal quotation marks omitted.]

Most signal picketing is prearranged, ("When you see the business agent wave his sign or handbill (no matter what it says), stop working and leave the job.") There is no suggestion here that the banners were a prearranged signal. If they were a signal, it was singularly unsuccessful. In any event, as noted, it is the object of the picketing upon which the statute focuses, not the impact.

Furthermore, the Respondents did no patrolling; instead, they stationed their banners significant distances from construction locations. Indeed, no evidence has been presented that the banners had any effect whatsoever upon neutral employees at any of the locations. Moreover, the banners were put up after work had begun and were removed before normal quitting times. Great lengths were taken to avoid active construction workers and thereby induce them not to work. Consistently, the banners were located in places where the public, but not workers, could see them.[20] Finally, the banner had no traditional message aimed at employees. Rather, it was "Shame on [named neutral].

I conclude from those facts that bannering, 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. The banner message is an expression of displeasure: Silver Star (Cadillac/Saab) dealerships, Shea Properties, Wermer's, Capital & Counties—'shame on you for your unsatisfactory behavior'—whatever it might be. Even before 1959, an appeal to "embarrassment and persuasion" of a neutral was permissible. *NLRB v. Business Machine & Office Appliance Mechanics Conference Board (Royal Typewriter Co.)*, 228 F.2d 553 at 560 (2d Cir. 1955), cert. denied 351 U.S. 962 (1956). Nothing has changed since then. A claim of shameful deeds is not any different and is likewise permissible.

And, although the message expresses the Unions' disdain, it does not amount to an appeal to any person to act upon it. There is no call for joinder. At best it is a request for the named neutral, if it wants to redeem itself in the Unions' eyes, to exercise its business discretion in a manner that does not offend. Indeed, the early letters made such a request. Such entreaties are perfectly lawful. See *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964), where the Supreme Court so held saying:

> The Board adopted the finding of the Trial Examiner that "the managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the face of threatened or actual handbilling. This, a policy decision, was one for them to make. The evidence is persuasive that the same authority was vested in the managers of Kory." 133 NLRB 1506. The Board held that on these facts the Local's efforts to enlist the cooperation of the supermarket managers did not constitute inducement of an "individual" within the meaning of that term in subsection (i); the Board held further that the handbilling, even if constituting conduct which "threaten[s], coerce[s], or restrain[s] any person" under subsection (ii), was protected by the [publicity] proviso to amended 8(b)(4). 133 NLRB 1501.

More specifically, the Court said at 51–52:

> In the instant case, . . . the Local, in asking the managers not to handle Servette items, was not attempting to induce or encourage them to cease performing their managerial duties in order to force their employers to cease doing business with Servette. Rather, the managers were asked to make a managerial decision which the Board found was within their authority to make. Such an appeal would not have been a violation of 8(b)(4)(A) before 1959, and we think that the legislative history of the 1959 amendments makes it clear that the amendments were not meant to render such an appeal an unfair labor practice.

Then Justice Brennan concluded:

> If subsection (i), in addition to prohibiting inducement of employees to withhold employment services, also reaches an appeal that the managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, subsection (ii) would be almost superfluous. Harmony between (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement of the managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would "threaten, coerce, or restrain" that exercise. Id. at 54.

Servette is a clear holding that a union may appeal to management's business discretion to cease doing business with another; what it may not do is that which is barred by (ii), "threaten, coerce or restrain" management to accomplish that purpose.[21]

A Board panel majority recently restated these principles in responding to former Chairman Hurtgen's dissent in *Food & Commercial Workers Local 1776 (Carpenters Health & Welfare Fund)*, 334 NLRB 507 (2001):

> Our dissenting colleague would find, in effect, that all picketing at a secondary site, no matter what the circumstances, is inherently coercive. He argues that all picketing is coercive, the Union picketed the Carpenters (i.e., the Council), the Council is a neutral employer, and therefore the Union restrained or coerced a neutral employer in violation of Section 8(b)(4)(B). We reject his syllogism. Section 8(b)(4)(ii)(B) does not outlaw picketing at a secondary site per se. See *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits*

[20] If a union takes care to avoid enmeshing neutrals, that is evidence that it has no cease doing business object. See, e.g., *Electrical Workers Local 302 (ICR Electric)*, 272 NLRB 920 (1984).

[21] Even before the 1959 amendments, the Supreme Court had said ". . . a union is free to approach an employer to persuade him to engage in a [secondary] boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees." *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93, 99 (1958).

Labor Relations Committee), 377 U.S. 58, 68 (1964) (union's secondary picketing of retail stores confined to persuading customers to cease buying the product of primary employer did not violate Section 8(b)(4)(ii)(B)). As the Court in *Tree Fruits* stated:

> When Congress meant to bar picketing *per se*, it made its meaning clear; for example, § 8(b)(7) makes it an unfair labor practice, "to picket or cause to be picketed . . . any employer. . . ." In contrast, the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise.

Thus, even where the employees of a primary employer (the Fund) may be reached at the primary's premises, picketing at the premises of a neutral, secondary employer (here the Council) is not per se a violation of the Act. The test for determining whether such picketing is lawful is the objective of the secondary activity, as gleaned from the surrounding circumstances. As the U.S. Court of Appeals for the District of Columbia Circuit stated in *Seafarers International Union v. NLRB*, 265 F.2d 585, 591 (D.C. Cir. 1959):

> The mere fact that [the neutral, secondary employer] felt some pressure from the picketing of the [primary employer's leased ship on the neutral's premises] is not dispositive of the problem under Section 8(b)(4). The critical consideration is that the pressure thus put on [the neutral] was not different from that felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed.

Here, I find that the "shame on" banners are, if anything other than publicity, only an appeal to neutral management to exercise its discretion in the future to not do business with M&M or Covi. This purpose may be discerned from both the early letters and the handbills distributed by the banner bearers. The banner message itself did not go even that far. Thus, even if a cease doing business object may be detected here, though evidence of such an object is nearly nonexistent, no (ii) threat, restraint or coercion has been shown.

I find therefore that Respondents' bannering at the sites in question is protected by the publicity proviso to § 8(b)(4) and that the conduct does not violate the Act. The complaints will be dismissed.

Based on the foregoing findings of fact and analysis, I hereby make the following

CONCLUSIONS OF LAW

1. All of the named employers are persons engaged in commerce within the meaning of § 2(1), (2), (6), and (7) of the Act.
2. Local 209 and the District Council are labor organizations within the meaning of § 2(5) of the Act.
3. Respondents have not engaged in unfair labor practices within the meaning of § 8(b)(4)(ii)(B) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The complaints are hereby dismissed in their entirety.

Dated, February 18, 2004

[22] 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 to them shall be deemed waived for all purposes.