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**Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America and Richie's Installations, Inc.** Case 21–CC–3337

**Carpenters Local No. 803, United Brotherhood of Carpenters and Joiners of America and Dearden's and LGC Builders, Inc., Fullmer, KCB Builders, and GMA, Parties in Interest.** Case 21–CC–3343

**Carpenters Local No. 1506, United Brotherhood of Carpenters and Joiners of America and Catholic Healthcare West d/b/a San Gabriel Valley Medical Center and Pacific Building Group, Party in Interest.** Case 21–CC–3345

**Carpenters Local No. 1506 United Brotherhood of Carpenters and Joiners of America; Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Brady Company of San Diego) and Guident Corporation.** Case 21–CC–3348

October 7, 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,<sup>2</sup> and conclusions,

<sup>1</sup> On August 22, 2005, Administrative Law Judge John J. McCarrick issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents Unions filed a joint answering brief.

We correct an inadvertent error by the judge, who stated that the banner at the premises of secondary employer Guidant Corporation read “Shame on Argent.” The record shows that the banner, consistent with the handbill, read “Shame on Guidant.”

<sup>2</sup> We find merit in the exception of the General Counsel that the judge erred in dismissing the complaint allegation in Case 21–CC–3348

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.) (Eliason)*, 355 NLRB No. 159 (2010); *Carpenters Local 506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (2010); and *Carpenters Local 1506 (AGC San Diego Chapter)*, 355 NLRB No. 191 (2010) (AGC).

In both *Eliason* and *AGC*, the parties stipulated that union agents held the banners stationary; the Board concluded in both cases that the display of stationary banners did not constitute picketing or other “threatening, coercing or restraining” conduct proscribed by Section 8(b)(4)(ii)(B). In this case, the General Counsel argues in his exceptions that the banner displays constituted picketing because the banners were moved in several instances. The judge, however, correctly found that the movement was de minimis. The parties stipulated that the individuals holding the banners “did not engage in . . . marching, or similar conduct.” Moreover, as the judge found, the movement was not continuous or even sustained. Rather, the movement was simply to carry a banner to the place where it was then displayed, to move a banner from one place to another to avoid alleged trespass or other alleged obstruction, and to keep those holding the banner out of the sun. Given that the General Counsel does not argue that the movement was not so limited, we agree with the judge's conclusion that these momentary movements of the banners were de minimis, do not constitute the type of patrolling that is an element

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that the Respondent Unions violated Sec.8(b)(4)(i)(B). In Case 21–CC–3348, the General Counsel alleged that certain conduct of the Unions at the premises of Charging Party Guidant Corporation served to induce and encourage employees to cease performing work. On June 13, 2005, the judge granted the General Counsel's motion to sever the relevant complaint paragraphs and remand the matter to the Regional Director for approval of an informal settlement agreement between the parties. Accordingly, we do not adopt the judge's dismissal of this allegation because it was no longer before him for his decision.

The General Counsel in his exceptions argues that at one location “the banner was a continuation of Respondents' earlier picketing, which various witnesses testified had occurred at this site.” The General Counsel does not, however, point to any specific testimony or any other evidence in the record. The judge made no finding of prior picketing and the General Counsel did not except to that failure (despite specifically excepting to the judge's failure to find other facts). The limited testimony about prior picketing does not specify the dates of the picketing, the precise location of the picketing, or the nature of the picketing. Without an exception to the failure to find prior picketing, specifying what the judge should have found concerning prior picketing (for example, when it occurred, precisely where it occurred, and what type of picketing it was), and pointing to testimony or other evidence in the record supporting such findings, we cannot reach the General Counsel's legal argument.

of picketing, and do not distinguish this case from either *Eliason* or *AGC*.

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 complaint is dismissed.

Dated, Washington, D.C. October 7, 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 employers who have done or are doing business with employers who are the primary targets in a labor dispute with the Respondents. The predominant 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. October 7, 2010

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

*Ami Silverman, Esq.*, for the General Counsel.

*Daniel Shanley, Esq. (DeCarlo & Connor)*, of Los Angeles, California, on behalf of Respondents, Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America; Carpenters Local 803, United Brotherhood of Carpenters and Joiners of America; Carpenters Local 1506, United Brotherhood of Carpenters and Joiners of America.

*Ronald Klepetar, Esq. (Jenkins & Gilcrest)*, of Los Angeles, California, on behalf of Charging Party Richie's Installations, Inc.

*John D. Collins, Esq. (Sheppard, Mullin, Richter, & Hampton)*, of San Diego, California, on behalf of Charging Party Dearden's.

*Stephen Lueke, Esq. (Ballard, Rosenberg, Golper & Savitt)* of Universal City, California, on behalf of Charging Party Catholic Healthcare West.

*Scott J. Witlin, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart)*, of Los Angeles, California, on behalf of Charging Party Guidant.

DECISION

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on June 13–14, 2005 based upon separate complaints consolidated on December 7, 2004 by the Regional Director for Region 21. The complaint in 21–CC–3337 issued on January 30, 2004, based upon an unfair labor practice charge filed on November 4, 2003 by Richie's Installations, Inc. (Richie's). The complaint in 21–CC–3343 issued on May 5, 2004 based upon an unfair labor practice filed on March 10, 2004 by Dearden's. The complaint in 21–CC–3345 issued on June 8, 2004, based upon an unfair labor practice filed on April 13, 2004 by Catholic Healthcare West d/b/a San Gabriel Valley Medical Center (CHW). The complaint<sup>1</sup> in 21–CC–3348 issued on November 30, 2004, based upon an unfair labor practice filed by Guidant Corporation (Guidant) on October 7, 2004 and amended on November 22, 2004. Generally, the complaints allege that Respondents' banner activity violated Section 8(b)(4)(i) and (ii)(B) of the Act. Respondents filed timely answers to the complaints denying any wrongdoing and contend that their activity is protected by the first amendment of the United States Constitution.

Upon the entire record herein, including the stipulation, and the briefs from the General Counsel, Respondents and Charging Parties, I make the following

FINDINGS OF FACT<sup>2</sup>

I. JURISDICTION<sup>3</sup>

Charging Party Richie's, a California corporation, is engaged in the installation and assembly of furniture and has annually provided services valued in excess of \$50,000 directly to employers engaged in commerce.

Charging Party Dearden's, a California Corporation with offices located at 700 South Main Street, Los Angeles, California and 117 North Broadway, Santa Ana, California, has been engaged in the retail sale of furniture, electronics, appliances and

<sup>1</sup> I granted General Counsel's motion to sever complaint pars. 8(a)–(d) and remanded them to the Regional Director for approval of an informal Board settlement.

<sup>2</sup> The parties entered into a stipulation of facts that sets forth the undisputed facts in this case. Witnesses were called regarding the sole disputed facts concerning the location of banners at Dearden's downtown Los Angeles facility and the location of the banner at Guidant's Temecula facility.

<sup>3</sup> Jurisdictional facts were part of the stipulation noted above and all parties stipulated to facts reflecting Board jurisdiction.

jewelry. In the course of its business Dearden's has annually had gross revenues in excess of \$500,000 and has purchased and received goods in excess of \$50,000 directly from points located outside the State of California.

Charging Party CHW, a California nonprofit corporation with a facility located at 438 West Las Tunas Drive, San Gabriel, California, and a Regional Office located in Pasadena, California, has been engaged in the operation of an acute care hospital. In the course of its business at the San Gabriel facility, CHW has annually had gross revenues in excess of \$250,000 and has purchased goods valued in excess of \$50,000 directly from points located outside the State of California.

Based upon the above, as well as the parties' stipulation, there is no dispute that each of the Charging Parties 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

Based upon the parties' stipulation, I find that Respondents and each of them is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this case are not in significant dispute. General Counsel has presented testimony dealing with the location of banners to establish the ambulatory nature of the bannering.

##### A. Common Facts

There are certain facts that are common to each of the sites where Respondents conducted bannering activities. The bannering took place at the Argent, Dearden's, CHW, and Guidant facilities. Argent, Dearden's, CHW, and Guidant contracted with general contractors or suppliers who in turn subcontracted work to subcontractors with whom Respondents had primary labor disputes: LGC Builders, Inc., Fullmer, KCB Builders, GMA, Pacific Building Group, Brady Company of San Diego (Brady's), and Richie's. At the Argent, Dearden's, CHW, and Guidant facilities Respondents caused stationary white banners to be placed which were about three to four feet high and 20 feet long. The banners which faced out toward public streets had large black lettering at either end together with larger red letters in the center which read:

LABOR	SHAME ON (NAME OF)	LABOR
DISPUTE	THE NEUTRAL)	DISPUTE

The banners were held in place by at least two of Respondents' representatives and no more individuals than was necessary to physically hold the banners. The banners were generally maintained in a stationary position. There was no chanting, marching, yelling or similar conduct while the banners were displayed. Handbills were distributed by Respondents' representatives at the Dearden's, and Guidant facilities to passersby who asked about the banners. It was stipulated that Respondents' bannering and handbilling activity pertained to the persons with whom they had a primary dispute performing work at the Argent, Dearden's, CHW, and Guidant worksites.

To facilitate the organization of this decision, the facts concerning each site where the banners were displayed will be discussed separately.

##### B. The Argent Site

Argent is a mortgage lender with an office in Orange, California. Argent procured office furniture from Herman Miller, Inc., (Miller) a manufacturer of office furniture. Miller engaged Charging Party Richie's to install its furniture at the Argent facility. Respondents are not recognized or certified as the collective-bargaining representative of any employees employed by Argent or Miller. Respondents' primary labor dispute is with Richie's. Beginning about October 14, 2003, Respondent Southwest Regional Council of Carpenters (Regional Council) established and maintained a banner in front of Argent's Orange, California facility. The white banner was about 20-feet long and 3-feet high. In the center of the banner in red capital letters about 18-inches high were the words "SHAME ON ARGENT MORTGAGE." At each end of the banner in black capital letter about 6 inches high were the words "LABOR DISPUTE." The banner was displayed daily from about 9:30 a.m. to about 12 noon and was held in place by two to four of Respondents' representatives. The banner was located on the sidewalk in front of the jobsite, Argent's Orange, California facility. The sidewalk leads from the parking structure used by tenants and customers of the Orange County building where Argent is located.

##### C. The Dearden's Sites

Charging Party Dearden's is a retailer of furniture, electronics, appliances and jewelry at its offices in Los Angeles and Santa Ana, California. Dearden Properties and Rancho Amigos Investors, Inc., (Rancho) lessors of commercial real property, agreed to construct a warehouse for Dearden's. On October 14, 2003 Dearden Properties' and Rancho contracted with general contractor Arco National Construction Company (Arco) to build the warehouse. Arco in turn considered for hire or hired subcontractors LGC Builders, Fullmer, KCB Builders and GMA to work on Dearden's warehouse. Respondents are not recognized or certified as the collective-bargaining representative of any employees employed by Dearden's, Dearden Properties, Rancho, or Arco. Respondents' primary labor dispute is with LGC Builders, Fullmer, KCB Builders, and GMA. From on or about March 9, 2004, to about April 14, 2004 Respondent Local 803 displayed a white banner about 20 feet long and 4 feet high. The center of the banner contained two foot high red capital letters which stated, "DEARDENS FURNITURE PROFITS FROM IMMIGRANT LABOR ABUSE." At each end of the banner in smaller black capital letters were the words "LABOR DISPUTE."

Local 803 representatives also had handbills that were given to pedestrians who asked about the banner. The banner was distributed in both the English and Spanish languages. The handbill states:

DEARDEN'S FURNITURE  
OPENS OUR COMMUNITY TO MORE  
IMMIGRANT LABOR ABUSE

(A cartoon appears below the caption depicting a standing figure in front of three prostrate individuals)

IT'S NOT RIGHT FOR HARD WORKING SOUTHERN

CALIFORNIANS TO HAVE TO PAY THE BILLS FOR CONTRACTORS WHO ARE RIPPING OFF OUR COMMUNITY AND CONTRIBUTING TO THE EROSION OF AREA STANDARDS FOR SOUTHERN CALIFORNIA CARPENTERS CRAFT WORKERS. **GMA CONSTRUCTION** IS SUBCONTRACTING WORK FOR **ARCO CONSTRUCTION**, (AN OUT OF STATE COMPANY), ON THE DEARDENS FURNITURE DISTRIBUTION WAREHOUSE. **GMA CONSTRUCTION** DOES NOT MEET AREA LABOR STANDARDS, INCLUDING PROVIDING FOR FAMILY HEALTH CARE AND PENSION FOR ALL OF ITS EMPLOYEES.

CARPENTERS LOCAL 803 OBJECTS TO SUBSTANDARD CONTRACTORS LIKE GMA CONSTRUCTION WORKING IN THE COMMUNITY. IN OUR OPINION, THE COMMUNITY ENDS UP PAYING THE TAB FOR EMPLOYEE HEALTH CARE AND THE LOW WAGES THEY PAY TEND TO LOWER GENERAL COMMUNITY STANDARDS, THEREBY ENCOURAGING CRIME AND OTHER SOCIAL ILLS.

CARPENTERS LOCAL 803 BELIEVES THAT **DEARDEN'S FURNITURE** HAS AN OBLIGATION TO THE COMMUNITY TO SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK ON BUILDINGS THEY WILL OCCUPY. THEY SHOULD NOT BE ABLE TO INSULATE THEMSELVES BEHIND "INDEPENDENT CONTRACTORS. FOR THIS REASON LOCAL 803 HAS A LABOR DISPUTE WITH ALL THESE COMPANIES.

PLEASE CALL **RONNIE BENSIMON** AT DEARDEN'S FURNITURE 213-362-9600 AND TELL HIM THAT WANT THEM [sic] TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR THEIR CONSTRUCTION PROJECT.

THE MEMBERS AND FAMILIES OF CARPENTERS LOCAL 803 THANK YOU FOR YOUR SUPPORT. FOR MORE INFORMATION CALL (714) 978-6232.

We are not urging any workers to refuse to work nor are we urging any suppliers to refuse to deliver any goods.

The banner was initially displayed at the corner of Main and 7th Streets near Dearden's 7th Street entrance in Los Angeles on March 9, 2004 at about 9:30 a.m. The banner was located near the curb of the public sidewalk at a truck loading zone. Because they were in a loading zone, the banner was moved between Dearden's entrances on Main street. In order to keep the banner and its holders in the shade, the banner was moved back to the 7th Street location later on March 9, 2004.<sup>4</sup> Later on March 9, representatives of the Southwest Council directed the sign holders to keep the banner at the Main street location after complaints from Dearden's that the banner was being moved

<sup>4</sup> See GC Exh. 1 and Jt. Exh. 7.

between the location on Main Street and the site on 7th Street.<sup>5</sup>

From April 14, 2004, to an unknown date Respondent Local 803 displayed the same banner at Dearden's Santa Ana, California facility. The banner was held by at least two of Respondents' representatives in front of the Santa Ana facilities' public parking lot, about 30 to 40 feet from the store's public entrance.

#### *D. The CHW Site*

CHW is affiliated with Pacific Medical Buildings, a developer of a medical building in San Gabriel, California. CHW has at least a 30 percent equity interest in the San Gabriel medical building. Pacific Building Group is the general contractor for the San Gabriel medical building. Respondent Local 1506 had a primary dispute with Pacific Building Group. Local 1506 has not been recognized or certified as the representative of CHW or Pacific Medical Building employees. On or about March 11, and March 17 to 19, 2004 Respondent Local 1506 established a banner on the sidewalk in front of CHW's regional office in Pasadena, California. The banner was similar in size and color to the banners at Argent and Dearden's. It bore the same labor dispute language and in large red letters said "SHAME ON CATHOLIC HEALTHCARE WEST."<sup>6</sup> The sign was held in place by two representatives of Local 1506.

#### *E. The Guidant Site*

Guidant is a manufacturer of medical devices and has facility in Temecula, California. Guidant retained Xnergy as general contractor to construct a lab/medical clean room at its Temecula facility. Xnergy in turn hired Brady to perform work on the lab/medical clean room project. Respondents Local 1506 and Southwest Council have a primary dispute with Brady. Respondents have not been recognized or certified as the representative of Guidant or Xnergy employees.

On or about October 4, 2004 about mid-January 2005 Respondents established a banner near the sidewalk of Guidant's Temecula facility.<sup>7</sup> The banner was similar in size, color and language to the banners described above. The banner stated that there was a "LABOR DISPUTE" and in larger red letter in the center of the banner said "SHAME ON ARGENT." The banner was held in place by two individuals from about 10 a.m. to 2 p.m. In addition Respondent's representatives had handbills<sup>8</sup> to pass out to pedestrians who asked about the banner. The handbills stated:

SHAME ON  
GUIDANT  
For desecration of the American

<sup>5</sup> It appears from the testimony of Ronny Ben-Simon, president of Dearden's, that from March 9 to 18, 2004 the banner holders kept the sign in the shade at the Main Street site from about 10 a.m. to 1:30 p.m. until it came into full sun then moved to the shade on 7th Street site from about 1:30 p.m. until 4 p.m. While Southwest Regional Council Business Representative Gilbert Badillo testified that the sign remained at the Main Street site from sometime after March 9, 2004 onward, he was not present at the Dearden's Los Angeles store every day. Since Ben-Simon was present each day, I credit his testimony.

<sup>6</sup> See Jt. Exhs. 9 and 10.

<sup>7</sup> See Jt. Exhs. 11 and 12.

<sup>8</sup> See Jt. Exh. 13.

### Way of Life

(There was a cartoon of a rat eating an American flag.)

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

Shame on Guidant for contributing to erosion of area standards for local carpenter craft workers. Carpenters Local 1506 has a labor dispute with **E F Brady-San Diego** that is a subcontractor for Xnergy. **E F Brady-San Diego** does not meet area labor standards, including providing or fully paying for family health care and pension for all of its carpenter craft employees.

Carpenters Local 1506 objects to substandard wage employers like **E F Brady-San Diego** 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 **Guidant** has an obligation to the community to do all it can to see that area labor standards are met for construction of their buildings.

PLEASE TELL GUIDANT THAT YOU WANT THEM TO  
DO ALL THEY CAN TO  
CHANGE THIS SITUATION AND SEE THAT AREA  
LABOR STANDARDS ARE MET FOR  
CONSTRUCTION OF THEIR BUILDINGS.

The members and families of Carpenters Local 1506 thank  
you for your support  
Call (858) 621-2670 for further information.

WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE  
WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS.

On or about October 4, 2004 Respondent's representatives held the above-described banner on the sidewalk facing the street in front of Guidant's Temecula facility. Initially, the sign was put together on the Guidant lawn adjacent to the sidewalk at the site where it was displayed. On October 4 and 5, the banner holders were told by both Guidant representatives and the police that they were trespassing on Guidant property by standing on the grass. Accordingly, on October 5, the sign was thereafter assembled off Guidant property about 100 feet from where it was displayed and walked down to the display location where it remained stationary.

### Analysis and Conclusions

While General Counsel's complaints allege that Respondents have violated Section 8(b)(4)(i) and (ii)(B), in the joint stipulation General Counsel argues that Respondents' bannering activity violated only Section 8(b)(4)(ii)(B) of the Act by enmeshing neutral employers. There is no argument and indeed no evidence that Respondents' conduct sought as its object to induce or encourage any employees to cease performing work. Accordingly, I shall dismiss complaint allegations alleging a violation of Section 8(b)(4)(i)(B) of the Act.

In regulating labor union's picketing, handbilling and other activities involving both speech and action, Congress balanced

the interests of a union's right to freedom of speech under the first amendment to the United States Constitution and the interests in protecting neutral employers from being enmeshed in primary disputes in which they had no interest. That balancing is reflected in the language of the pertinent portions of Section 8(b)(4) of the Act:

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, including consumers and members of a labor organization, that product or products are produced by an employer with whom the labor organization has a primary dispute. . . .

In order to establish a violation of Section 8(b)(4)(ii)(B) of the Act, General Counsel must establish that a labor organization has engaged in conduct that threatens, coerces or restrains. Traditional picketing has been found coercive. Next it must be established that the conduct is secondary rather than primary picketing. Finally the object of the conduct must be to force any person to cease doing business with another person. Last truthfully advising the public, other than by picketing, of a primary dispute may not be enjoined.

Section 2(9) of the Act defines a labor dispute as:

[A]ny 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.

### A. The Issues

General Counsel and the Charging Parties contend that the bannering described above violated Section 8(b)(4)(ii)(B) of the Act. They argue that the bannering activity is essentially picketing or "signal picketing" designed to restrain or coerce Argent, Dearden's, CHW, Guidant, and other neutral employers with an object of requiring them to cease doing business with Richies' installation, Brady and other persons. General Counsel argues that the bannering was not truthful and is not protected by the provisos of Section 8(b)(4) of the Act or the United States Constitution.

Respondents counter that the bannering is neither picketing nor coercive but rather activity protected under both the provisos to Section 8(b)(4) of the Act and the first amendment to the

United States Constitution and cite the Supreme Court's decision in *Edward J. DeBartolo v. Florida Gulf Coast Building and Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988) in support of this proposition.

#### B. The Case Law

This is not a case of first impression. The banner activity undertaken by various Carpenters' locals has been the subject of seven unfair labor practice decisions before administrative law judges, three actions for 10(l) injunctive relief before the United States District Courts and one appeal of a District Court denial of 10(l) relief to the United States Court of Appeals for the Ninth Circuit.

In five unfair labor practice decisions, the administrative law judges found that the banner activity did not constitute coercive picketing: Judge Kennedy in *Southwest Regional Council of Carpenters, et al., (Carignan Construction Co.)* JD(SF)-14-04, Judge Meyerson in *Southwest Region Council of Carpenters, et. al. (New Star General Contractors, Inc.)* JD(SF)-76-04, Judge Rose in *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)* JD(SF)-02-05 and Judge Anderson in *Carpenters Local Union 1506, et. al. (Sunstone Hotel Investors, LLC.)*, JD(SF) 01-05 and *Southwest Regional Council of Carpenters, et. al. (Held Properties, Inc.)* JD(SF)-29-05. In two unfair labor practice decisions, Judge Parke in *Local 1827, Carpenters (United Parcel Service)*, JD(SF)-30-03 and Judge Litvack in *Southwest Regional Council of Carpenters (Held Properties)*, JD(SF)-24-04 concluded banner activity was coercive conduct akin to traditional picketing not protected by the proviso. These decisions are not binding upon me. Respondents on brief also cite memoranda of the General Counsel's Division of Advice which are only positions of the General Counsel. These memoranda likewise do not bind me.

In each of three petitions for 10(l) injunctive relief, *Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp. 2d 1155 (C.D. CA 2003), *Benson v. Carpenters, Locals 184 & 1498*, (337 F. Supp. 2d 1275 (D. Utah, 2004), and *Overstreet v. Carpenters Local 1506*, 2003 U.S. Dist. LEXIS 19854 (S.D. CA 2003) the District Courts found there was not reasonable cause to believe that Section 8(b)(4) of the Act had been violated since the banner activity was not like traditional picketing but protected under *DeBartolo II*. Likewise, in the appeal to the United States Court of Appeals for the Ninth Circuit in *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005), the Court found no reasonable cause to believe that Section 8(b)(4) of the Act had been violated. While neither the United States District Courts' nor the United States Court of Appeals for the Ninth Circuit decisions in the context of 10(l) proceedings are not binding precedent on an administrative law judge in an unfair labor practice proceeding, they provide reasoned and experienced guidance on constitutional issues.

The threshold issue for resolution is whether the banner activity of Respondents at the various worksites constitutes picketing or its functional equivalent such that it constituted prohibited coercive conduct not protected under a *DeBartolo II* analysis.

In *DeBartolo II*, the Supreme Court found that a union's handbilling neutral retailers without picketing did not threaten,

coerce, or restrain any person engaged in commerce as prohibited by Section 8(b)(4)(ii) of the Act. The Court characterized the handbilling without coercive conduct as "mere persuasion"<sup>9</sup> and narrowly construed the Act, limiting a broad restriction on handbilling to avoid conflict with the first amendment's prohibition on limitations of free speech.<sup>10</sup>

Since *DeBartolo II*, the Board and Federal courts have held that secondary handbilling, when not accompanied by picketing or other coercive conduct is not prohibited by Section 8(b)(4)(ii)(B). However, the Board has yet to rule on the question of whether secondary banner activity, unaccompanied by other coercive conduct, violates Section 8(b)(4)(ii)(B).

General Counsel and Charging Party CHW cite several Board cases for the proposition that patrolling is not an essential element of picketing and that stationary sign holders may be signal pickets. *Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965); *Lawrence Typographical Union No. 570*, 169 NLRB 279, 283 (1968); *Mine Workers District 12 (Traux-Traer Coal Co.)*, 177 NLRB 213, 218 (1969); *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999); *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999); *Mine Workers, District 2 (Jeddo Coal Co.)*, 334 NLRB 677 (2001). In each of these cases there had been previous traditional picketing that involved patrolling with typical picket signs (*Stoltze Land & Lumber Co.*; *Lawrence Typographical Union No. 570*; *Jeddo Coal Co.*, *Telephone Man*; *We're Associates*, supra), or some other form of coercion, including threatening to use up to 200 men to shut a jobsite down (*Traux-Traer Coal Co.*, supra). Also in *K-Mart Corp.*, 313 NLRB 50 (1993), a case involving banners, the Board affirmed the decision of the administrative law judge who found that the placement of three-foot by six-foot and three-foot by twelve-foot banners together with handbilling of consumers by 12 to 28 union supporters at the entrance to a K-Mart store violated Section 8(b)(4)(ii)(B) of the Act. The administrative law judge found the union's conduct went beyond peaceful persuasion and was accompanied by other coercive conduct including a demonstration by up to 50 union supporters in the K-Mart parking lot, parading, chanting with a bullhorn, blocking access to shopping carts, and lying in front of oncoming vehicles in the parking lot.

In *Overstreet v. Carpenters Local 1506*, 409 F. 3d 1199 (9th Cir. 2005), the Court, citing *DeBartolo II*, 485 U.S. at 587, found that the Legislative History of Section 8(b)(4)(ii)(B) of the Act clearly proscribes only "ambulatory picketing" of secondary businesses. This is not inconsistent with the above cited Board cases since each case contained some elements of traditional picketing or other coercion. The Court in *Overstreet* emphasizes that traditional picketing includes "walking in a line, and, in so doing create a symbolic barrier." Slip opinion page 10. The Court rejected General Counsel's contention that the Union's banner activity constituted coercive picketing.

<sup>9</sup> *DeBartolo II*, supra at 580.

<sup>10</sup> Contrary to counsel for Charging Party CHW's assertion, I find nothing in *DeBartolo II* to suggest that handbilling or its functional equivalent has been characterized as "commercial speech" not entitled to the full protection of the first amendment's free speech guarantee.

The Court in *Overstreet* also rejected the argument that the banners amounted to “signal picketing” finding that “signal picketing” involves some prearranged sign to employees of a neutral, including union members, to cease performing work. The Board’s decisions are in accord. See *Electrical Workers Local 98 (Telephone Man)*, supra, where a union agent on the pretext of being a neutral gate observer, regularly flashed what amounted to a picket sign to employees of neutrals entering the gate.

### C. Discussion

I reject General Counsel’s argument that the Respondent’s bannering herein constituted picketing or signal picketing. I find that the bannering is more akin to use of billboards, newspaper ads, or handbills than traditional picketing, whether ambulatory or a substitute for patrolling pickets. Other than de minimis movements of the banners at the Guidant and Dearden’s locations occasioned by orders of the police or in order to stay out of the heat of the midday, there was no record evidence of patrolling traditionally associated with picketing, nor was there any other evidence of blocking access to entrances, confrontation with employees, chanting, marching or other coercive conduct in conjunction with the bannering. Contrary to the assertion of Counsel for Charging Party Guidant, I find no evidence of prior traditional picketing or other coercive conduct by the Unions at the Guidant facility.

Further, I find that the Respondents’ bannering had no element of a prearranged signal to employees of neutrals to cease engaging in work. As the Court in *Overstreet* noted,

To broaden the definition of “signal picketing” to include “signals” to any passerby would turn the specialized concept of “signal picketing” into a category synonymous with any communication requesting support in a labor dispute. If “signal picketing” were defined so broadly, then the handbilling in DeBartolo would have been deemed signal picketing. *Overstreet*, supra at slip opinion page 12.

Having found that Respondents bannering does not constitute picketing or its functional equivalent, I conclude that it is not a threat, coercion or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Next General Counsel argues that the banners contain information that is fraudulent and not protected by the proviso to Section 8(b)(4) or the first amendment. General Counsel contends that the banners are misleading to the extent that they imply that a primary labor dispute exists between Respondents and the neutral employers named thereon without identifying the primary employers with whom the Respondents have a labor dispute.

Respondents contend that the Act makes clear that a labor

dispute may exist with a neutral or secondary employer. Section 2(9) of the Act defines a labor dispute more broadly than a primary dispute and may encompass secondary employers. All of the lower federal courts who considered the 10(l) petitions in the bannering cases as well as the 9th Circuit Court of Appeals in *Overstreet* agreed. The *Overstreet* Court found that since the Unions had a “labor dispute” with the secondary retailers within the meaning of Section 2(9) of the Act, the use of the term “labor dispute” was not fraudulent. *Overstreet*, supra, slip opinion at page 14.

I am baffled by General Counsel’s characterization of the banners as fraudulent. I concur with the Respondents position as supported by the decisions of the above Courts that General Counsel’s contention is in conflict with the Act’s definition of “labor dispute”. The signs’ language referring to a “labor dispute” with the named neutral employers are true statements consistent with the Act’s 2(9) definition of a labor dispute protected by both the first amendment to the United States Constitution and the proviso to Section 8(b)(4) of the Act.

Having reached these conclusions, I find that the bannering engaged in by the Respondents herein did not violate Section 8(b)(4)(ii)(B) of the Act. Accordingly, the complaints shall be dismissed.

### 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. Each of the named Charging Parties and employers are persons engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents have not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i),(ii)(B) of the Act.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>.

### ORDER

The complaints are hereby dismissed in their entirety.

Dated, San Francisco, California, August 22, 2005.

<sup>11</sup> If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the finding, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.