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**Southwest Regional Council of Carpenters and its Local 1506 and Held Properties, Inc.**

**Southwest Regional Council of Carpenters and its Local 209 and Hilton Hotels Corporation. Cases 31–CC–2126 and 31–CC–2127**

October 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,  
PEARCE, AND HAYES

This case concerns whether the Respondent Union violated Section 8(b)(4)(ii)(B) of the Act by displaying large banners proclaiming a “labor dispute” at locations associated with two 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 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 Unions’ 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 (2010); *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB No. 11 (2010) (*Held Properties I*); *Carpenters Local 1506 (Marriott Center Woodland Hills)*, 355 NLRB No. 219 (2010); and *Carpenters Local 1506 (AGC San Diego Chapter)*, 355 NLRB No. 191 (2010).<sup>2</sup> Accordingly, for the reasons stated in those

<sup>1</sup> On April 5, 2005, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel and Charging Party Held Properties each filed exceptions and a supporting brief. The Respondent Union filed an answering brief.

<sup>2</sup> In *Held Properties I*, supra, we observed that the union had engaged in lawful area-standards picketing 5 days before it began displaying the banner. We concluded that the prior picketing did not distinguish the facts in that case from those in *Eliason*. See 356 NLRB No. 11, supra, slip op. at 1–2. The record in the present case reflects that Respondent Local 1506 engaged in area-standards picketing at the Mercantile Bank jobsite for about 2 hours on March 30, 2004, 2 days before establishing a banner display near the jobsite. As in *Held Properties I*, the picket signs here named the primary employer, Gingerich Construction, while the subsequent banner display named only the secondary, Mercantile Bank. The General Counsel does not allege that the prior picketing was unlawful, nor does he rely on the prior picketing

decisions, we find that Section 8(b)(4)(ii)(B) does not prohibit the banner displays in this case.<sup>3</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 29, 2010

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Wilma B. Liebman, Chairman

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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.<sup>1</sup> The banner activity involves the placement of union agents holding large banners proximate to the premises of neutral employers who are doing business with an employer who is the primary target in a labor dispute with the Respondents. The predominate element of such banner activity is confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the neutral employers’ business, and thereby to further an objective of forcing those employers to cease doing business with the primary employer 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

in arguing that the banner displays were unlawful. The judge did not address the prior picketing in his analysis, and there are no exceptions to his failure to do so. For these reasons, in addition to those stated in *Held Properties I*, supra, we find that the prior picketing here does not affect our conclusion that the banner displays did not violate Sec. 8(b)(4)(ii)(B).

<sup>3</sup> The General Counsel argues in his exceptions that the banner displays violated Sec. 8(b)(4)(ii)(B) as unlawful secondary “common situs” picketing. See *Sailors’ Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950). Since we have rejected the contention that the banner displays constituted picketing, we find it unnecessary to reach this argument.

<sup>1</sup> Unlike in *Eliason*, the banner activity here was preceded by picketing. While I would find the banner activity unlawful even in the absence of picketing, the occurrence of picketing soon before or after banner activity serves to underscore the common coercive aspects of the two activities.

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 29, 2010

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 Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

*Katherine Braun Mankin, Esq.*, for the General Counsel.  
*Daniel M. Shanley, Esq. (DeCarlo & Connor)*, of Los Angeles, California, for the Respondents.  
*Charles H. Goldstein, Esq. and Jonathan A. Goldstein, Esq. (Goldstein & Petito)*, of Los Angeles, California, for Charging Party Held Properties, Inc.  
*Mark Theodore, Esq. and Adam C. Abrahms, Esq. (Proskauer Rose)*, of Los Angeles, California, for Charging Party Hilton Hotels Corporation.

DECISION

STATEMENT OF THE CASE

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

The two instant complaints arose as follows: On April 2, 2004, Held Properties, Inc. (the Charging Party Held) filed a charge with the Board docketed as Case 31–CC–2126 against the Southwest Regional Council of Carpenters (Respondent Counsel) and its Local 1506 (Respondent Local 1506). The Regional Director for Region 31 of the National Labor Relations Board (Regional Director) issued a complaint respecting the charge on April 29, 2004.

On April 7, 2004, the Hilton Hotels Corporation (Charging Party Hilton and, together with Charging Party Held, the Charging Parties) filed a charge with the Board docketed as Case 31–CC–2127 against Southwest Regional Council of Carpenters and its Local 1506 (Respondent Local 209 and, together with Respondent Council and Respondent Local 1506, the Respondents). The Director issued a complaint respecting the charge on May 14, 2004.

<sup>1</sup> The order consolidated five additional complaints filed by charging parties not involved herein. Those cases were severed at the hearing and subsequently have not been and are not now part of the instant consolidated matter. The instant matter was scheduled for additional days of trial in February 2005, however the parties reached agreement on stipulated facts obviating the need for further hearings and submitted a joint motion to receive stipulations, close the record and set time for the filing of posthearing briefs. I granted the motion on February 17, 2004. The due date for submission of posthearing briefs was March 23, 2005.

Charging Party Hilton filed a Motion for Summary Judgment respecting Case 31–CC–2127 with the Board which the Board denied on October 18, 2004.

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

FINDINGS OF FACT

Upon the entire record herein, including helpful briefs from the Respondents, the General Counsel, and Charging Parties Held and Hilton, I make the following findings of fact.<sup>2</sup>

I. JURISDICTION<sup>3</sup>

Charging Party Held, with an office and primary place of business at 1880 Century Park East, Suite 500, Los Angeles, California, has been engaged in business as a property management, real estate brokerage and a licensed contractor. At all relevant times it has annually purchased and received goods, supplies, and materials valued in excess of \$50,000 from sources located outside the State of California and enjoyed gross revenues in excess of \$1,000,000.

Charging Party Hilton, with an office and primary place of business at 9335 Civic Center Drive, Beverly Hills, California, has been engaged in the hotel business. At all relevant times it has annually purchased and received goods, supplies, and materials valued in excess of \$50,000 from sources located outside the State of California and enjoyed gross revenues in excess of \$500,000.

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

II. LABOR ORGANIZATIONS

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Evidence<sup>4</sup>

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

1. Charging Party Held—Case 31–CC–2126

Commencing in or about February 2003, pursuant to a lease agreement between Held and its tenant Mercantile National Bank (the Bank), Held was engaged as a general contractor to perform and oversee commercial construction work at the office building located at 1880 Century Park East, Los Angeles,

<sup>2</sup> As a result of the pleadings, substantial individual written stipulations covering each charge, and additional post hearing stipulations, there were few disputes of fact regarding collateral matters. No witnesses testified. Where not otherwise noted, the findings herein are based on the pleadings and the stipulations.

<sup>3</sup> All jurisdictional facts were stipulated and Board jurisdiction was admitted by all parties.

<sup>4</sup> The evidence set forth herein is taken essentially verbatim from the stipulations of the parties.

California (the Bank jobsite). During the period April 1, 2004, through mid-August 2004, the Bank conducted its business operations at 1840 Century Park East, Los Angeles, California (the Bank's original location). In mid-August 2004, the Bank moved its business operations to the Bank jobsite.

Under the terms of the lease with the Bank, Held selected the subcontractors to perform construction work at the Bank jobsite. In connection with the construction at the Bank jobsite, Held, as the general contractor, engaged Gingerich Construction (Gingerich) as a subcontractor to perform drywall services at the Bank jobsite. Held, the Bank and Gingerich are, and have been at all material times, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(B) of the Act.

At all material times, the Respondents were not recognized or certified as the collective-bargaining representatives of any employees employed by Held or the Bank, nor have the Respondents demanded recognition as the collective-bargaining representative of or sought to organize any employees employed by Held or the Bank.

The Respondents do not dispute the wages paid by Held or the Bank to their employees. The Respondents primary labor dispute is with Gingerich. The Respondents do dispute the wages paid by Gingerich to its employees who were working on Held's, the Bank's and other projects.

At all material times Rich Whitley is and has been a business representative employed by the Respondent Council. At all material times Rich Whitley has been an agent of Respondent Council within the meaning of Section 2(13) of the Act. Whitley is, at times an agent of Local 1506. He is not an officer of Respondent Local 1506. He receives no compensation from Respondent Local 1506. His full salary is paid by Respondent Council. The Respondent Local 1506 did not and does not reimburse Respondent Council when he spends time performing work for Local 1506.

On March 30, 2004, Charging Party Held, by its legal representative, sent Whitley a letter stating in part:

This letter is to put you and your Union on notice that Gingerich is not working at 1880 Century Park East having left the premises shortly after your Union began picketing. Any work performed by Gingerich will be performed during the evening hours between 8 p.m. and 6 a.m. Therefore, if your Union is solely interested in influencing Gingerich and not Held Properties you should hereafter conduct your picketing activities during the hours when Gingerich is coming to or leaving the job site or working at the job site.

From on or about April 1, 2004, and continuing through mid-August 2004, Respondent Local 1506 began displaying at the jobsite a banner approximately 20 by 4 feet in size. The banner was white with "SHAME ON MERCANTILE NATIONAL BANK" appearing in capital letters approximately two feet high in red. At both ends of the banner, the words "LABOR DISPUTE" appear in black capital letters approximately one foot high.

The banner was displayed four days a week from approximately 9 a.m. to 2 p.m. The banner was accompanied by two to

three individuals who were either members of or employed by Respondent Local 1506.

The banner was located at all times on the sidewalk of Century Park East, Los Angeles, California, on the west side of the street, opposite and 174 feet diagonally northwest of the jobsite and 167 feet diagonally southwest of the Banks original location.

Employees and visitors to the offices located in the same building as the jobsite may enter the building by the front door or from the parking structure, which has a rear entrance directly into the building. There is one driveway leading to the parking structure for the jobsite. This driveway is located on Century Park East adjacent to and immediately south of the building. The parking structure is located behind the jobsite.

At all relevant times, construction employees were allotted parking spaces in the parking structure. Anyone entering from the North must pass directly in front of the banner. Anyone entering from the South will not pass directly in front of the banner but will see it. Century Park East is a major thoroughfare in Century City, which is a densely commercial section of West Los Angeles, with numerous high-rise buildings with professional legal, accounting and commercial offices. The Century City Westfield Shopping Mall, a large commercial center with shops, restaurants, and theatres, is adjacent to the office buildings.

At all material times, the banner was held stationary and upright by the banner bearers, with the bottom of the banner touching the ground. The banner did not have "feet" and could not stand upright on its own. Once the banner was erected at the beginning of the day, it did not move, but remained stationary at the particular place on locations, until it was taken down at the end of the day. The banner was accompanied by the number of bearers required to physically hold it up and take staggered breaks, normally three in number, who remained stationary at all times during the display, except during their breaks. The banner bearers also had handbills available. The General Counsel does not contend that the factual representations made in the handbill are either false or true. The General Counsel does not contend that the handbill or its distribution violates the Act. However this does not reflect the position of the Charging Parties.

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

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

**Mercantile National Bank** is developing, owns, manages or will be a tenant at 1880 Century Park East, in the city of Los Angeles. **Held Properties** is generally in charge of construction at this project. **Held Properties** has contracted with **Gingerich Drywall** to do the drywall work. **Gingerich Drywall** does not meet area labor standards for work-they do not pay

prevailing wages to all of their employees during that work, including fully paying for family health care and pensions.

Carpenters Local 1506 objects to substandard employers like **Gingerich Drywall** 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 **Mercantile National Bank** has an obligation to the community to see that contractors who perform work on buildings they develop, own, manage or lease meet area standards. They should not be allowed to insulate themselves behind “independent” contractors. For this reason Local 1506 has a labor dispute with all these companies.

PLEASE CALL [name omitted] PRESIDENT AND CEO OF MERCANTILE NATIONAL BANK AT [telephone number omitted] AND TELL HIM THAT YOU WANT THE COMPANY TO DO ALL IT CAN TO CHANGE THIS SITUATION AND SEE THAT CONTRACTORS WHO PERFORM CONSTRUCTION WORK ON BUILDINGS THEY DEVELOP MEET AREA LABOR STANDARDS.

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

At all material times, the banner holders did no more than hold up the banner and/or give handbills. They did not engage in chanting, yelling, marching, or similar conduct. At all material times, the banner holders did not physically block the ingress or egress of any person wishing to enter or leave the job-site.

The Respondents admit that the placement of the banner was selected so as to maximize exposure to the general public and all persons, including passing motorists and pedestrians, who might be in the area.

The parties February 2005 stipulation of facts further stipulates that the Respondent Council along with Respondent Local 1506 is responsible for all the banners displayed as described above.

## 2. Charging Party Hilton—Case 31–CC–2127

Commencing on or about January 19, 2004, the Mian Corporation (Mian), a franchisee of Respondent Hilton, engaged R.D. Olsen (Olsen) to act as general contractor to perform construction work at 2000 Solar Drive, Oxnard, California (the Oxnard jobsite). In connection with the construction, Olsen engaged Covi Construction (Covi) to perform various construction services, including pouring concrete, at the Oxnard jobsite. Hilton has no contract with Covi and receives no services, directly or indirectly, from Covi. Hilton has no legal authority or ability to select or control the contractors or subcontractors which Mian selects for any construction at the Oxnard jobsite. Hilton, Mian, Olsen and Covi are, and have been at all material times, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

At all material times, the Respondents were not recognized or certified as the collective-bargaining representatives of any employees employed by Hilton, Mian, or the Olsen, nor have the Respondents demanded recognition as the collective-bargaining representative of or sought to organize any employees employed by Hilton, Mian, or the Olsen.

The Respondents do not dispute the wages paid by Hilton, Mian, or Olsen to their employees. The Respondents primary labor dispute is with Covi. Covi has no employees working on any Hilton-owned projects. The Respondents do dispute the wages paid by Covi to its employees who were working on Mian’s, Olsen’s, and other projects.

Beginning on April 2, 2004, and continuing until approximately late September 2004, Respondent Local 209 displayed, at the location described below, a banner approximately 20 by 4 feet in size. The banner was white with “SHAME ON HILTON CORPORATION” appearing in capital letters approximately two feet high in red. At both ends of the banner, the words “LABOR DISPUTE” appear in black capital letters approximately one foot high. The parties agree Respondent Local 209 is responsible for displaying the banner and other conduct described in this section.

The banner was displayed 4 days a week, Tuesday through Friday, from approximately 9 a.m. to 3 p.m. The banner was accompanied by two to three individuals who were either members of or employed by Respondent Local 209. The banner was located at all times on the sidewalk immediately in front of Hilton’s Worldwide Headquarters located at 9335 Civic Center Drive, Beverly Hills, California, between the walkway that leads to the front door of the building and the entrance to the driveway that leads to Charging Party Hilton’s parking lot. The banner was located between 3–22 feet from the driveway and approximately 20 feet from the edge of the walkway and 100 feet from the front door of Charging Party Hilton’s office building.

The driveway is used by Charging Party Hilton’s visitors and employees. The banner was located such that all employees, customers and visitors would have to either walk or drive past the banner and banner bearers to enter or exit the Hilton Worldwide headquarters. No construction is taking place at the site of the bannering. The banner location is approximately 55 miles from the Oxnard jobsite. No representative, agents, or employees of Covi have ever worked at or had business at Hilton World Headquarters.

The location of the banner at the banner site was such that all pedestrians and drivers and passengers in vehicles seeking to enter Hilton’s Worldwide Headquarters would have to pass by the banner, and also so that all individuals traveling in either direction in the vicinity of 9335 Civic Center Drive, Beverly Hills, California would see it.

At all material times, the banner was held stationary and upright by the banner bearers. The banner could not stay upright on its own. Once the banner was erected at the beginning of the day, it did not move, but remained stationary at the particular place on location, until it was taken down at the end of the day. The banner bearers also had handbills available. The handbills were distributed only to those who inquired. The General Counsel does not contend that the factual representa-

tions made in the handbill are either false or true. The General Counsel does not contend that the handbill or its distribution violates the Act.

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

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

Shame on the Hilton Hotel Corporation who is franchising the Hilton Garden Inn owned by Mian Corporation, located in the city of Oxnard, for contributing to erosion of area standards for carpenter craft workers. Covi Concrete is a sub contractor for general contractor RD Olsen on the Hilton Garden Inn in Oxnard. **Covi** does not meet area labor standards for all its carpenter craft workers, including fully paying for family health care and pensions.

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

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

PLEASE TELL THE HILTON HOTEL CORPORATION 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 FRANCHISED HOTELS.

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

The banners were accompanied by the number of bearers required to physically hold them up and take staggered breaks, normally three in number, who remained stationary at all times during the display doing so, except during their breaks. At all material times, the banner holders did no more than hold up the banner and give fliers to any interested member of the public. At no material time did the banners physically block the ingress or the egress of any person wishing to enter or leave Hilton Worldwide Headquarters.

Respondent 209 admits that the placement of the banner was selected so as to maximize exposure to the general public and all persons, including passing motorists and pedestrians, who might be in the area.

At all material times, Hal Jensen is and has been a business representative employer by the Respondent Counsel. At all

times Jensen has been an agent of Respondent Local 209 within the meaning of Section 2(13) of the Act. He receives no compensation from Local 209. His full salary is paid by the Respondent Counsel. Respondent Local 209 did not and does not reimburse the Respondent Counsel when Jensen spends time performing work for Local 209.

On or about April 2, 2004, Jensen had a telephone conversation with Charging Party Hilton’s attorney, Adam Abrahms, regarding the banner at the banner site. During this telephone conversation, Jensen was informed that Hilton did not have the authority or ability to affect any dispute with Covi, nor could it control which contractors and subcontractors Mian selected. Jensen also stated that he had the authority to remove the banner and that if Hilton were able to “get rid” of Covi, they would pull it down.

The parties’ February 2005 stipulation of facts further stipulates that the Respondent Council along with Respondent Local 209 is responsible for all the banners displayed as described above.

### *B. Complaint Allegations*

#### 1. Charging Party Held—Case 31–CC–2126

The General Counsel’s complaint in Case 31–CC–2126 at paragraph 6 alleges that Respondent Counsel and Respondent Local 1506’s display of their banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 7 and 8 further allege that the bannering threatened, coerced, and restrained Charging Party Held and/or the Bank and other persons engaged in commerce or in industries affecting commerce and that an object of Respondent Counsel and Respondent Local 1506’s conduct was to force or require Charging Party Held and/or the Bank and other persons to cease doing business with Gingerich. Finally the complaint alleges that by these actions Respondent Counsel and Respondent Local 1506 are engaging in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

#### 2. Charging Party Hilton—Case 31–CC–2127

The General Counsel’s complaint in Case 31–CC–2127 at paragraph 6 alleges that Respondent Counsel and Respondent Local 209’s display of their banner, as described above, constitutes signal picketing and fraudulent unprotected speech. Complaint paragraphs 7 and 8 further allege that the bannering threatened, coerced, and restrained Charging Party Hilton and/or Mian and/or RD Olsen and other persons engaged in commerce or in industries affecting commerce, and that an object of Respondent Local 209’s conduct was to force or require Charging Party Hilton and/or Mian and/or RD Olsen and other persons to cease doing business with Covi Concrete. Finally the complaint alleges that by these actions Respondent Counsel and Respondent Local 209 are engaging in conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

### *C. Analysis and Conclusions*

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

The United States Constitution’s First Amendment provides:

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

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

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

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

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

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

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

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

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

patrolling, was not coercive and therefore did not violate Section 8(b)(4) of the Act.

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

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

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

## 2. Positions of the parties

### a. The nature of the conduct involved

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

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

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

Apparently the bannerings at issue herein have been undertaken by various Carpenters' locals in recent times and a number of such occurrences have been the subject of actions under the Act. All the parties have cited earlier determinations in cases quite similar to those before me. Each side advances the determinations favorable to its position as conclusive while discounting or dismissing contrary findings. It is appropriate to review the holdings cited.

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

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

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

In addition to the authorities cited immediately above, the "banner issue" at the heart of the instant cases has been the subject of several administrative law judge unfair labor practice decisions: *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)* JD(SF)-02-05(2005) (Judge James L. Rose); *Carpenters Local 1506 (Sunstone Hotel Investors LLC)*, JD(SF)-01-05 (2005) (Judge Clifford H. Anderson); *Southwest Regional Council of Carpenters (New Star General Contractors, Inc.)*, JD(SF)-76-04 (2004) (Judge Gregory Z. Meyer-son); *Southwest Regional Council of Carpenters (Carnigan Constr. Co.)*, JD(SF)-14-04 (2004) (Judge James M. Kennedy); *Carpenters Local 1827 (United Parcel Service)*, JD(SF)-30-03 (2003) (Judge Lana H. Parke); *Southwest Regional Council of Carpenters (Held Properties)*, JD(SF)-24-04(2003) (Judge Burton Litvack).

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

The cited decisions of the six administrative law judges have reached different results in considering the arguments of the

contending parties herein. These decisions however are not binding on me and are, in fact, before the Board for decision on exceptions in each case. The memoranda of the General Counsel's Division of Advice are simply prosecutorial positions which the General Counsel may modify or reverse. They also are not binding on me.

While none of the decisions and memoranda noted are binding on me, the legal analysis of the various learned jurists and legal scholars, in the decisions and briefs submitted to me, in their totality, skillfully illuminate a subtle area in a traditionally difficult area of the law. The issue cries out for a definitive resolution by higher authority, which will doubtless soon be forthcoming. In the meantime, given the as-yet-incomplete resolution of the question, it is necessary to consider the arguments of the parties and reach a determination without guiding precedential determination by higher authority.

3. The General Counsel's threshold arguments

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

The General Counsel notes on brief at 10 that signal picketing describes "activity, short of a true [traditional] picket line, which acts as a signal to neutrals that sympathetic action on their part is desired by the union." *Iron Workers Local 433 (R.F. Erectors) v. NLRB*, 598 F.2d 1154, 1158 fn. 6 (9th Cir. 1979), enfg. 233 NLRB 283 (1977). The General Counsel argues that the large banners at issue herein, considering their highly visible location and their "flanking agents" constitute a "similarity to a picket line [that] is not coincidental." (GC Br. at 12.) The government further argues that the banner language using the term "labor dispute" and naming only neutral employers sent out a "call to action" (GC Br. at 12.) that signaled that they desired a boycott of the named employers.

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

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

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

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

The General Counsel argues on brief at 15 that the banners' language was improper for three reasons. First, the banners without exception failed to name the primary employer with whom Respondent's have their disputes and named only neutral employers. Second, the banners "proclaimed the existence of labor disputes and painted the neutrals as deserving 'shame' from the community due to the dispute." Third, the Respondents deceived the public that they had labor disputes with neutral employers and either explicitly or implicitly requested consumer boycotts of the neutrals. The General Counsel concludes: "This clearly amounted to coercive 'economic retaliation' within the meaning of the Act." (GC Br. at 16.) The government seeks by characterizing Respondent's communications as fraudulent to defeat any argument that the conduct was constitutionally protected.

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

The Respondents further argue that the banners under challenge, which are designed to be displayed to the motoring public cannot be expected to contain more than a short slogan and that the absence on the banners of primary and secondary disputant distinctions are unnecessary and impractical. Handbills were available to the public from the banner attendees which, specify in detail the type and nature of the Respondents' disputes with the various employers and the employers' relationships to one another.

While not determinative of the outcome herein, I agree with counsel for the Respondents who has received the support of recent Federal District Court decisions in this regard, as cited *supra*, that the banner references to "labor dispute" in association with the names of the neutrals as described above are not fraudulent, but rather, true in the sense that they are consistent

with the quoted definitional language of Section 2(9) of the Act. I also find that the fact that the Respondents' agents standing with the banners had handbills available on request, which explained the intricacies of the relationship of the employer and the Respondents, supports the Respondents' arguments here.

4. The heart of the case—the characterization of banner displays as picketing or other conduct

*a. Arguments*

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

The cases cited, *supra*, have considered and compared the conduct at issue with patrolling pickets, hand billing and the maintenance of a billboard—all occurring with similar language in similar locations. In the three District Court cases, *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp. 2d 1155 (C.D. CA 2003); *Overstreet v. Carpenters Local 1506*, 2003 U.S. Dist. LEXIS 19854 (S.D. CA 2003); and *Benson v. Carpenters Locals 184 and 1498*, Case No. 2:04-CV-00782 PGC (D. Utah September 27, 2004), and in the ALJ decisions of Judge Rose in *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)*, JD(SF)–02–05(2005); Judge Kennedy in *Southwest Regional Council of Carpenters, (Carnigan Constr. Co.)*, JD(SF)–14–04, and Judge Meyerson in *Southwest Regional Council of Carpenters (New Star General Contractors, Inc.)*, JD(SF)–76–04, the jurists held that the banner conduct at issue was not directly analogous to patrolling picketing and concluded that under the Court's teachings in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988), the banner conduct fell outside the reach of Section 8(b)(4)(ii) of the Act.

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

Judge Litvack in *Southwest Regional Council of Carpenters (Held Properties)*, JD(SF)–24–04 and Judge Parke in *Carpenters Local 1827 (United Parcel Service)*, JD(SF)–30–03, found

the Respondents' conduct herein to be more akin to traditional picketing<sup>5</sup> which they note the Board views quite broadly. As a result of this finding, each further found the bannerling was violative of Section 8(b)(4)(ii)(B) of the Act.

*b. Analysis and Conclusion*

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

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

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

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

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

<sup>5</sup> The Court in *DeBartolo II*, supra, distinguished the peaceful hand-billing under consideration therein from picketing. (485 U.S. at 571.)

tion 8(b)(4)(ii)(B) of the Act, it follows that the Respondent's have not violated the Act as alleged and the complaints shall be dismissed.

In reaching this determination, I find the issue is subtle and calls out for definitive resolution by higher authority. The decisions of Judge Parke in *Carpenters Local 1827 (United Parcel Service)*, JD(SF)-30-03 (2003), and Judge Litvack in *Southwest Regional Council of Carpenters (Held Properties)*, JD(SF)-24-04 (2004), correctly note that the Board has tended to view various types of labor organization protest actions as conduct as akin to picketing and does not lightly find such conduct beyond the reach of Section 8(b)(4)(ii)(B) of the Act. The Board's decisions are binding on administrative law judges in unfair labor practices cases including this judge in the instant case. I do not find, however, that the current Board decisional law definitively resolves the specific issue at hand. And I am very mindful of the teachings of the Court in *DeBartolo II*, supra, that the Board must always review its definitions and analytical approach with a view to avoiding interpretations of the Act which conflict with constitutional prohibitions. Where the distinction between constitutionally protected free speech and regulatable labor organization conduct is subtle, the recent precedents divided and the matter not as yet resolved by higher authority, special cautions must be applied by all judges, including administrative law judges, so as to avoid applying unsettled law in such a way as to improperly restrict constitutionally protected conduct.

CONCLUSIONS OF LAW

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

1. The Charging Parties are, and each has been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondents are, and each has been at all relevant times, labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondents did not violate the Act as alleged in the complaints and the complaints shall be dismissed in their entirety.

ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.<sup>6</sup>

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

Dated, San Francisco, California April 5, 2005

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.