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**Mid-Atlantic Regional Council of Carpenters and Goodell, Devries, Leech & Dann, LLP and Starkey Construction Company, Inc. Case 5–CC–1289**

November 2, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,  
PEARCE, AND HAYES

This case concerns whether the Respondent, Mid-Atlantic Regional Council of Carpenters (the Union), violated Section 8(b)(4)(ii)(B) of the Act by displaying a large stationary banner proclaiming a “labor dispute” at the location of a secondary employer.<sup>1</sup> The judge found the violation, concluding that the banner display constituted “coercive picketing” with an object of forcing the secondary employer to cease doing business with the primary employer.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to reject the judge’s conclusions consistent with our recent decisions in *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB No. 159 (2010); *Carpenters Local 1506 (Associated General Contractors)*, 355 NLRB No. 191 (2010); and *Carpenters Local 1506 (Held Properties)*, 356 NLRB No. 11 (2010). In *Eliason*, supra, we concluded that the union’s display of large stationary banners did not violate Section 8(b)(4)(ii)(B) of the Act. We find that the banner display in this case was, for all relevant purposes, the same as the conduct found lawful in *Eliason*. We further find, for the reasons set forth in *Held Properties*, supra, that the banner display was not rendered unlawful because it was preceded at the secondary location by area-standards picketing using traditional picket signs that named only the primary employer, Starkey Construction.<sup>2</sup> In accord with these deci-

<sup>1</sup> On March 2, 2006, Administrative Law Judge Eric M. Fine issued the attached decision, which was supplemented by two Errata. The Union filed exceptions and a supporting brief, and the American Federation of Labor and Congress of Industrial Organizations and its Building and Construction Trades Department filed an amici curiae brief in support of the Union’s exceptions. The General Counsel and Charging Party filed answering briefs, and the Union filed a reply brief.

<sup>2</sup> The General Counsel’s stated position at the hearing was that “there’s nothing unlawful about the area-standards picketing that occurred before the banner was erected,” and that he was not “rely[ing] on any conduct that came before the banner to allege that the banner conduct was unlawful.” In light of this disclaimer, the judge clearly went beyond the General Counsel’s theory of the case in relying on the prior picketing (which included the display of a large inflatable rat) to

sions, we find that the Union’s banner display in this case did not violate Section 8(b)(4)(ii)(B).<sup>3</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 2, 2010

find the banner display unlawful. See *Paul Mueller Co.*, 332 NLRB 1350 (2000) (judge improperly proceeded to find violation of the Act on theory expressly disclaimed by the General Counsel).

Moreover, while the judge repeatedly cited the prior picketing, he did not carefully analyze the nature of that activity or explain his rationale for finding that the subsequent banner display constituted “coercive picketing” or otherwise coercive activity. The banner named only the secondary employer—the law firm of Goodell, DeVries, Leech & Dann. The Union’s dispute with the law firm concerned the use of Starkey in the expansion of the firm’s offices. But the picketing that occurred between May 26 and July 15, 2005 involved traditional picket signs naming Starkey, and concluded more than 3 weeks before the banner display began on August 9. Although subsequent picketing occurred between July 18 and August 5, it related to a wholly separate dispute involving neither the law firm nor Starkey and the picket signs used in the later picketing named only an entirely separate employer, Wilhelm Commercial Builders, which had been retained by another tenant in the building.

Despite these facts, and without analyzing the precise nature of the prior picketing or its timing, the judge found that the Union’s banner display, naming only the law firm, “was a continuation of its prior picketing activity,” and constituted “picketing” and coercive conduct. We find that the judge’s decision provides no logical link between the prior picketing and his finding that the banner display was unlawful. We conclude, therefore, that there is nothing in his decision that might persuade us to deviate from our holdings in *Eliason* and *Held Properties*.

<sup>3</sup> We reject the judge’s reliance on the testimony of Thomas Goss as evidence of coercion. Goss, a joint owner of the law firm, testified that the Union’s banner display had the potential to cause damage to the firm’s business. The judge, in fn. 4 of his decision, cites as authority the Supreme Court’s decision in *NLRB v. Retail Store Employees*, 447 U.S. 607, 611 (1980) (*Safeco*), that the “potential damage to a secondary employer is one element in assessing whether a union’s conduct is coercive” under 8(b)(4). But that case involved picketing, not a banner display, and therefore is not relevant to the question of coercion in this case. In *Safeco*, the Court distinguished between permissible product picketing and impermissible secondary picketing, but as we held in *Eliason*, the banner display here was not picketing of any sort. See also *Eliason*, supra, slip op. at 10, fn. 30 (“stationary holding of banners announcing a labor dispute, even if such conduct is intended to and does in fact cause consumers freely to choose not to patronize the secondary employer, does not constitute such direct, coercive interference with the employer’s operations or a threat thereof.”) Accordingly, we find it unnecessary to rule on the Union’s request that the record be reopened to allow cross-examination of Goss regarding the potential damage to the law firm that the Union’s banner display may have had.

The judge only briefly mentioned the General Counsel’s theory that the Union’s banner display was coercive because it constituted “signal picketing” and expressly did not reach his theory that the banner display constituted fraudulent speech because the banner did not name Starkey as the employer with whom the Union had a primary dispute. The General Counsel did not except to the judge’s treatment of these theories, although the Union does dispute the signal-picketing theory. In any event, we note that these two theories were fully addressed and rejected by the Board in *Eliason*, supra, slip op. at 9–10 (signal picketing) and 15 (fraudulent speech).

## DECISION

## STATEMENT OF THE CASE

<hr/> Wilma B. Liebman,	Chairman
<hr/> Craig Becker,	Member
<hr/> Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The bannerling 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>4</sup> The bannerling involves the placement of union agents holding a large banner proximate to the premises of a neutral employer who is doing business with an employer who is the primary target in a labor dispute with the Respondent. The predominate element of such bannerling is confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the neutral employer's business, and thereby to further an objective of forcing that employer to cease doing business with the primary employer in the labor dispute. Like picketing, this bannerling 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. November 2, 2010

<hr/> Brian E. Hayes,	Member
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## NATIONAL LABOR RELATIONS BOARD

*James C. Panousos, Esq.*, for the General Counsel.*Eric Hemmendinger, Esq.*, of Baltimore, Maryland, for the Charging Party.*Daniel M. Shanley, Esq.*, of Los Angeles, California and *Brian F. Quinn, Esq.*, of Washington, D.C. for the Respondent.

<sup>4</sup> Unlike in *Eliason*, the bannerling here was preceded by picketing. While I would find the bannerling unlawful even in the absence of picketing, the occurrence of picketing soon before or after bannerling serves to underscore the common coercive aspects of the two activities.

ERIC M. FINE, Administrative Law Judge. This case was tried in Baltimore, Maryland, on December 21, 2005. The charge was filed on August 15, 2005, by Goodell, DeVries, Leech & Dann, LLP (referred to as Goodell or the Charging Party) against the Mid-Atlantic Regional Council of Carpenters (referred to as the Union, the Council, or as Respondent).<sup>1</sup> The complaint issued on November 17, alleging the Union engaged in picketing and fraudulent unprotected speech since August 9, in violation of Section 8(b)(4)(ii)(B) of the Act by attempting to cause Goodell and Constantine Commercial Construction, Inc., (Constantine), and other persons engaged in commerce to cease doing business with Starkey Construction Co., Inc. (Starkey). On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, and the Union, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The parties stipulated that: Goodell, a Maryland limited liability partnership jointly owned by David W. Allen, Richard M. Barnes, Bonnie J. Beavan, Thomas J. Cullen, Jr., E. Charles Dann, Jr., Donald L. DeVries, Jr., Charles P. Goodell, Jr., Thomas M. Goss, Amy B. Heinrich, Jeffrey J. Hines, Kelly Hughes-Iverson, Kamil Ismail, Sidney G. Leech, Michael L. Lisak, Craig B. Merkle, Thomas V. Monahan, Jr., Susan T. Preston, Thomas J. S. Waxter, III, and Linda S. Woolf, is engaged in providing legal representation and legal services at its Baltimore, Maryland facility from where during the past 12 months it derived gross revenues in excess of \$250,000, and performed services valued in excess of \$50,000 in states other than the State of Maryland. Starkey, a corporation, with a facility in Cockeysville, Maryland, has been engaged as a drywall contractor in the construction industry, providing commercial building construction services, and during the past 12 months has purchased and received at its Cockeysville, Maryland facility goods valued in excess of \$50,000 directly from points outside the state of Maryland. Constantine, a corporation with a Timonium, Maryland facility has been engaged as a general contractor in the construction industry, providing commercial building construction services, and during the past 12 months has purchased and received at its Timonium, Maryland facility goods valued in excess of \$50,000 directly from points outside the State of Maryland. At all material times, Goodell, Starkey, and Constantine are each employers engaged in commerce, and persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The information set forth immediately below was derived

<sup>1</sup> All dates are in 2005 unless otherwise indicated

from the parties' written stipulation:

Beginning in January 2005, Goodell sought to expand its offices located at the Alex Brown Building, One South Street, Baltimore, Maryland. Goodell contracted with Constantine to perform the construction. Constantine subcontracted the drywall work for the construction to Starkey. The Union was not recognized or certified as the collective bargaining representative of any employees employed by Constantine and/or Starkey, nor has the Union demanded recognition as the collective bargaining representative or sought to organize any employee employed by Constantine and/or Starkey. The Union does not dispute the wages paid by Constantine or Goodell to their employees; therefore, the Union has no primary dispute with Constantine or Goodell. The Union's primary labor dispute is with Starkey. The Union does dispute the wages paid by Starkey to its employees who are or were working on Goodell's project.

On or about August 9, 2005, and continuing to the present, with the exception of about one week in November 2005, the Union displayed at the job site, a banner approximately 20 feet by 4 feet in size. The banner is white, with "Shame On Goodell DeVries, Leech & Dann, LLP" appearing in capital letters approximately eleven (11) inches high in black. At both ends of the banner, the words "LABOR DISPUTE" appeared in red capital letters approximately eight (8) inches high. Since on or about August 9, 2005, the banner was displayed on a public sidewalk at South Street, directly outside the Alex Brown Building approximately 25 to 30 feet north from the four main entrances to the building. Other than the South Street entrances, public access to the Alex Brown Building and Goodell's offices may be gained only by the Alex Brown Building's parking garage on Commerce Street and a service entrance also located on Commerce Street to the north of the parking garage.

The banner was displayed at the jobsite on weekdays, generally five times a week, from approximately 9 a.m. to 3 p.m. The banner was accompanied by no less than two but no more than four individuals who were either members of local unions affiliated with the Union or employed by the Union. The banner was printed only on the front side. At all material times, the banner displayed by the Union was held stationary and upright by the banner bearers in a straight line, with the bottom of the banner touching the ground. In each instance, the banner was erected at the beginning of the day and 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 Union's banner holders also had handbills available, although they have not sought out pedestrians to whom to distribute these handbills. One handbill was available until on or about October 28, 2005, and the other handbill was available after that date.<sup>2</sup> The General Counsel does not contend the factual representations made in the handbills are false. The General Counsel does not contend the handbills or their distribution violates the Act. The

<sup>2</sup> The parties submitted both handbills into evidence as joint exhibits.

banners were accompanied by normally three of the Union's agents, banner holders, who remained at all times during the display. The banner holders held up the banner and gave flyers to any inquiring member of the public. The banner holders did not engage in chanting, yelling, marching, or similar conduct. At no material time did the Union's representatives physically block the ingress or egress of any person wishing to enter or leave the Alex Brown Building. The Union admits the placement of the banner was selected to maximize exposure to the general public and all persons, including passing motorists and pedestrians, who might be in the area, and the location on which the banner was erected was a major approach way to Goodell for persons doing business with Goodell.

On or about October 25, 2005, the Union's counsel was notified by Goodell by letter that Starkey completed its work at Goodell on October 19, 2005. The Union continued its banner activity and its hand bill activity as described above after October 25, 2005.

There were two witnesses who testified during this proceeding. They were Thomas Goss, an attorney and a partner in the Goodell law firm, and George Eisner, the Union's director of organizing.<sup>3</sup> Eisner credibly testified the Union began picketing activity against Starkey on May 26 at the One South Street location and this picketing ended on July 15. The Union then began picketing at the same site against Wilhelm Commercial Builders, Incorporated (Wilhelm) on July 18 and that the picketing against Wilhelm ended on August 5. Wilhelm was not involved in the construction work for Goodell. Rather, Wilhelm performed work for another tenant in the building. The picketers wore signs about three feet by four feet in size made of yellow cardboard. The Starkey sign read, "Starkey Construction Company, Incorporated does not pay the area standard wages and benefits, the Mid-Atlantic Regional Council of Carpenters." The sign also contained smaller print stating, "We have a labor dispute with the above-named company. We are appealing only for the public, the consumer. We are not seeking to induce any person to cease work or refuse to make delivery." The Wilhelm picket sign was identical to the Starkey sign, except that the company name on the sign was Wilhelm Commercial Builders, Incorporated. Eisner testified the banner concerning Goodell went up on August 9 at the One South Street site. He credibly testified the Goodell banner was not displayed at the site at the same time there was picketing activity there against Starkey or Wilhelm.

Upon observation of their demeanor, the content of their testimony, and the record as a whole, I have credited Goss and Eisner's testimony to the extent discussed herein. Goss' recollection was not clear as to dates as that of Eisner's, and I have credited Eisner over Goss as to the sequence of events, as Eisner's recollection was clear and specific.

Goss credibly testified the Union's picketing activity against Starkey at One South Street involved the use of a large inflat-

<sup>3</sup> Upon observation of their demeanor, the content of their testimony, and the record as a whole, I have credited Goss and Eisner's testimony to the extent discussed herein. Goss' recollection was not clear as to dates as that of Eisner's, and I have credited Eisner over Goss as to the sequence of events, as Eisner's recollection was clear and specific.

able rat, about a story and a half tall, sitting in the back of a large pickup truck. There were also people walking in an oval line near the door of the building. The line was about 30 feet in length. There was a person in the middle chanting and then there was a response. The words were, "Who's the rat? Starkey. Where's the rat? South Street." The chanting was repeated, and the words would change on occasion. Goss credibly testified he remembered the name of the Goodell law firm being used in a chant on one occasion. Goss testified there were around 20 people in the picket line, but the number varied depending on the weather. Goss testified there was some picketing activity every day during the time period of the picketing, although there were some days when the rat was not there. Goss testified the picketers against Starkey were there from around 9:30 a.m. and were gone by 3 p.m. Goss credibly testified while the Union was engaged in this activity there was room for only single file pedestrian traffic for people walking northbound on South Street. He also testified there was only room for one person at a time to get into the building.

As set forth above, the picketing against Starkey and Wilhelm ceased on August 5, and on August 9, the Union posted the banner, as described above, against Goodell close to the main entrance of the building where Goodell has its offices. Goss testified the Goodell banner was about one block from the Baltimore City Courthouse (the Courthouse) where the Goodell law firm practices and members of the firm try cases on a regular basis in front of juries. He testified the banner was visible to pedestrians, cars and buses. Goss testified there is a restaurant in the building where the law firm has its offices. Goss credibly testified he has observed judges regularly eating there, and people with juror tags eating there. Goss testified that at a trial the jurors are introduced to the attorneys by their name and the name of the firm. Goss testified he is very concerned about the banner and the impact it might have on jurors. He testified the banner could reflect against the attorney and could be damaging to his clients. Goss credibly testified one of his partners completed a 2 and ½ week trial at the Courthouse during the last month prior to the unfair labor practice trial.<sup>4</sup>

<sup>4</sup> Goss testified the last case Goss had that went to trial at the Courthouse was in 2003. However, Goss testified he was currently involved at the Courthouse in cases where plaintiffs are alleging injury due to asbestos. Goss represents the defendants in these cases who, at various times, are contractors, suppliers, and manufacturers. Goss testified a number of claimants are workers in the construction industry, including some members of the Carpenters' Union. Goss testified he has been involved in early stages of this litigation at the Courthouse since the banner was posted, but that no jury has been selected at the time of the unfair labor practice trial. Upon the Union's objection, I excluded Goss' testimony about the asbestos litigation from the record at the unfair labor practice trial, but allowed Goss to testify to the above by way of question and answer offer of proof. I now reverse my ruling and have admitted this credited testimony as part of the record. In this regard, the Union's banner activity against Goodell is open ended as it was on going at the time of the unfair labor practice trial on December 21, although the parties stipulated that Starkey, with whom the Union had its primary dispute, had left the site in mid-October. Moreover, the potential damage to a secondary employer is one element in assessing whether a Union's conduct is coercive within the meaning of Sect. 607,

Eisner testified the banner activity against Goodell was continuing as of December 21, the day of the unfair labor practice trial. Eisner testified the Union chose the language on the Goodell banner based on advice of counsel in that the use of the language had been approved in numerous decisions before administrative law judges, and in some federal court cases.<sup>55</sup> He testified the banner is not self standing. Eisner testified he thought building management would remove the banner if the Union left it unattended and the banner has never been left unattended by union personnel.

Eisner testified the purpose of the banner is to inform the public that Goodell chose contractors who did not pay area standard wages and fringes on Goodell's construction project. He testified the Union's goal once the public learned this information was for the public to call Goodell and ask them to correct the problem as requested in the Union's handbill. He admitted there was no way for members of the public to receive this message from looking at the banner itself, and they could only learn it by requesting a copy of the Union's handbill from one of the banner holders. Eisner at first denied it was the Union's intention to put pressure on Goodell. He then admitted the Union wanted the law firm to change its behavior by hiring area standard contractors. He testified he did not care whether or not they were union contractors as long as they paid area standards wages and fringes. Eisner testified Goodell can hire Starkey if Starkey paid area standards wages. Eisner testified if a contractor does not pay area standard wages the Union would not want them to work in the building or for Goodell.

#### *A. Positions of the parties*

The General Counsel argues the Union has engaged in two different types of coercive conduct prohibited by Section 8(b)(4)(ii)(B). First, the Union's posting of a large banner accompanied by several individuals near the entrance to Goodell's premises creates a symbolic and confrontational barrier tantamount to a picket line. The General Counsel argues the Union's conduct is traditional or signal picketing. The General Counsel also argues the Union is using unprotected speech on the banner by seeking a consumer boycott of the neutral Goodell. The General Counsel argues the Union's posting is coercive on two grounds: (1) it was made with reckless disregard for the truth so as to mislead the public into believing the Union had a labor dispute with Goodell over the treatment of Goodell's own employees; and (2) it constitutes defamation by implication. The General Counsel argues the Union's conduct is not free speech protected under the First Amendment to the U.S. Constitution.

The Union argues finding a violation of the Act would constitute a violation of the Union's First Amendment rights. The Union asserts five Article III courts and six administrative law judges have rejected the General Counsel's "constitutionally insensitive theories." The Union argues these decisions including one of the ninth circuit hold that interpreting Section 8(b)(4)(ii)(B) to prohibit the Union's activity here would pose a

611 (1980). I have credited Goss' testimony that he was concerned about the impact the banner would have

<sup>55</sup> Prior litigation of banner activities by Carpenters Union affiliates will be discussed in the Analysis section of this decision

significant risk of infringing First Amendment rights, and special deference by the Board should be given to the ninth circuit and district judge's rulings since these cases involve First Amendment questions. The Union argues Respondent's display of its banner does not rise to the level of a threat, coercion, or restraint necessary for a finding of an unlawful secondary boycott. The Union contends with no patrolling, ambulatory picketing, blocking, violence, confrontation, intimidation, chanting, shouting or other mis-conduct to weigh against the Union's free speech rights there is no support under controlling Supreme Court precedent to find the Union's conduct violative of the Act. The Union states the banner is posted on a public sidewalk. It is held up by two to four banner holders as it cannot be left unattended because it is not self standing and would be confiscated by local authorities or the property owner. The Union contends neither the banner nor the handbills advocate a consumer boycott against the Goodell. The Union argues the banner is not signal picketing because it does not constitute a signal for any other union action. The Union argues the General Counsel improperly focuses on the language of the banner, noting that the term "shameful" does not constitute a threat. The Union argues the concentration on the language on the banner, as opposed to the conduct of the Union, constitutes a collision with the First Amendment. It is asserted the term "labor dispute" on the banner is truthful, and has been found to be such by reviewing authorities since secondary employers are parties to a labor dispute as defined in Section 2(9) of the Act.

#### B. Analysis

##### 1. Prior court cases and the decisions of other administrative law judges

As set forth above, one court of appeals, and four district courts have addressed the Carpenters Unions' bannering activities in Section 10(l) injunctive proceedings, and several other administrative law judges have rendered decisions in unfair labor practice trials on this issue, which are currently on appeal before the Board.<sup>66</sup> In *Kentov v. Sheet Metal Workers Interna-*

<sup>66</sup> See, *Overstreet v. Carpenters Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005); *Gold v. Mid Atlantic Regional Council of Carpenters*, 407 F. Supp. 2d 719 (D.MD. 2005); *Benson v. UBCJA, Locals 184 and 1498*, 337 F.Supp. 2d 1275 (D. Utah 2004); *Overstreet v. Carpenters Local Union No. 1506*, 2003 U.S. Dist. Lexis 19854 (S.D. CA, 2003); and *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp. 2d 1155 (C.D. Ca. 2003) denying the General Counsel's requests for 10(l) injunctive relief in Carpenters bannering activity cases. *Gold v. Mid Atlantic Regional Council of Carpenters*, supra, involved a request before a district judge for injunctive relief for the Union's activity that is the subject of the current unfair labor practice trial. The Union also cites six administrative law judge decisions that have dismissed complaints concerning Carpenters Union bannering activity. They are: *Southwest Regional Council of Carpenters*, et al., JD(SF)-14-04, 2004, (February 18, 2004); *Southwest Regional Council of Carpenters*, JD(SF)-76-04 (November 12, 2004); *Carpenters Local No. 1506*, JD SF-01-05 (January 6, 2005); *United Brotherhood of Carpenters Locals 184 and 1498*, JD (SF)-02-05 (January 13, 2005); *Southwest Regional Council of Carpenters*, JD(SF)-29-05 (April 5, 2005); and *Southwest Regional Council of Carpenters*, JD(SF)-59-05 (August 22, 2005). Of note, two other administrative law judges have found the Carpenters' bannering activity to be violative of the Act. See

*tional Association Local 15*, 418 F.3d 1259, 1262–1263 (2005), a case where the General Counsel was seeking Section 10(l) injunctive relief, and the union there was defending by asserting its First Amendment rights, the court stated:

Section 10(l) of the NLRB authorizes district courts to grant temporary injunctive relief pending the Board's resolution of certain unfair labor practice charges, such as secondary boycotts, which are likely to have a disruptive effect upon the flow of commerce. 29 U.S.C Section 160(l); *Dowd v. Int'l Longshoremen's Ass'n*, 975 F.2d 779, 782, 782–83 (11th Cir. 1991). A Section 10(l) proceeding is ancillary to the Board's administrative proceedings, and the ultimate determination of the merits of the unfair labor practice case is reserved for the Board subject to review by the courts of appeals under Section 10(e) and (f) of the NLRA. See *Dowd*, 975 F.2d 779.

Thus, while a request for injunction in this case under Section 10(l) of the Act was denied by a district judge, that decision is ancillary to the underlying unfair labor practice litigation and is not binding on me. See also, *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 681-682 (1951). Similarly, the decisions in other 10(l) proceedings and by other administrative law judges are not binding on me as I am required to follow Board law. See, *Ford Motor Co.*, 230 NLRB 716, 718, fn. 12 (1977), *enfd.* 571 F.2d 993 (7 Cir. 1978), *affd.* 441 U.S. 488 (1979).

##### 2. The alleged unfair labor practices

Section 8(b)(4)(ii)(B) of the Act provides, in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents—(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *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 purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

It is stated in *Service Employees Local 87 (Trinity Mainte-*

*Carpenters and Joiners of America*, et al., JD(SF)-30-03, (May 9, 2003); and *Southwest Regional Council of Carpenters*, JD(SF)-24-04 (April 2, 2004). The Board has not yet ruled on these cases.

nance), 312 NLRB 715, 742 (1993), enfd. 103 F.3d 139 (9th Cir. 1996), in reference to Section 8(b)(4)(B) of the Act that:

As the Supreme Court has explained, the above-quoted provision of the Act reflects ‘the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own.’ *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). Thus, while Section 8(b)(4)(B) of the Act leaves unfettered a labor organization’s traditional right to engage in direct action against an employer, with which it is engaged in a primary labor dispute, including the right to induce the primary employer’s employees to engage in a strike or refusal to handle goods, the provision’s more ‘narrowly focused’ purpose is to ‘restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and . . . dangerous practice of unions to widen that conflict’ and coerce neutral employers not concerned with the primary dispute. *Carpenters Local Angeles County District Council Local 1976 v. NLRB*, 357 U.S. 93, 100 (1958).

It was further noted in *Service Employees Local 87 (Trinity Maintenance)*, supra at 743 that, “it is no less a violation of Section 8(b)(4)(B) of the Act for a labor organization to disrupt the business of an unoffending neutral employer, which has no business relationship with the primary employer, in the hope that said neutral will be pressured into interceding in a labor dispute between the labor organization and the primary employer. *Iron Workers Local 272 (Miller & Solomon)*, 195 NLRB 1063 (1972); *Hearst Corp.*, supra at 322.”<sup>7</sup>

In *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 73 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992), the Board set forth the following principles:

It is well settled that picketing (or other coercive conduct) violates Section 8(b)(4) if the object of it is to exert improper influence on a neutral party. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689 (1951), *Electrical Workers IBEW Local 501 v. NLRB*, 756 F.2d 888, 892 (D.C. Cir. 1985). Although our inquiry must be based on the intent, rather than on the effects of the union’s conduct, *International Rice Milling Co. v. NLRB*, 341 U.S. 665, 672 (1951), the union’s intent is measured as much by the necessary and foreseeable consequences of its conduct as by its stated objective. *Longshoreman ILA Local 799 (Allied) International*, 257 NLRB 1075 (1981). Thus we look to the ‘totality of the circumstances’ to determine whether the Union’s conduct demonstrates an unlawful purpose. *Electrical Workers IBEW Local 501*, supra at 893.

It was stated in *Mississippi Gulf Coast Building*, 222 NLRB 649, 654 (1976), enfd. 542 F.2d 573 (5th Cir. 1976), concerning common situs picketing, that:

In a case commonly referred to as the *Moore Dry Dock* case,<sup>8</sup>

<sup>7</sup> See *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 U.S. 303 (1970).

<sup>8</sup>the Board set forth certain standards for the determination of presumptively valid picketing against primary employers as follows:

[I]n the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer’s premises; (b) At the same time of the picketing the primary employer is engaged in its normal business at the situs; (c) The picketing is limited to the places reasonably close to the location of the situs; and (d) The picketing discloses clearly that the dispute is with the primary employer. Conversely the absence of the above criteria or conditions reflect invalid picketing.

It is clear in the instant case that the Union’s posting of a large banner near the entrance to the offices of Goodell was for the purpose of causing Goodell to cease doing business with Starkey, or at a minimum of causing Goodell to intervene on the Union’s behalf in the Union’s dispute with Starkey. See *Service Employees Service Employees Local 87 (Trinity Maintenance)*, supra at 743. First, the Union continued the display of its banner long after the Union was informed that Starkey ceased performing work at the site. Moreover, the Union’s banner failed to disclose the Union’s dispute was with Starkey. In fact, the Union did not even mention Starkey’s name on its 20 by 4 foot banner, where only Goodell’s name appears.<sup>9</sup>

Moreover, union official Eisner admitted the purpose of the banner was to inform the public that Goodell chose contractors who did not pay area standards and fringes. Eisner admitted the Union wanted Goodell to change its behavior by hiring only area standards contractors, of which Starkey was not one. Thus, the purpose of the Union’s banner activity was to put pressure on secondary employer Goodell to cease doing business with primary Starkey, or to exert pressure on Starkey to alter its wage and benefit policies. The Union’s purpose was one proscribed by Section 8(b)(4)(B) of the Act in that it sought to broaden its dispute with Starkey by placing pressure on secondary employer Goodell.

The question then becomes was the Union’s banner activity picketing or other coercive conduct proscribed by Section 8(b)(4)(ii)(B) of the Act. In *NLRB v. Fruit & Vegetables Pack-*

<sup>8</sup> See *Sailors Union of the Pacific, AFL (Moore Dry Dock Co.)*, 92 NLRB 547 (1950).

<sup>9</sup> The Union’s handbills, available at the site are further evidence of its purpose of causing Goodell to cease doing business or at a minimum intervene in the Union’s dispute with Starkey. The Union objects in the handbills to Starkey’s alleged failure to meet area standards in wages and benefits. The handbills solicit the public to call Goodell and tell them to do all they can to change the situation. Thus, the handbills show it was the Union’s intent to pressure Goodell to cease doing business with Starkey as long as Starkey failed to meet the Union’s demands. I do not find the fact that the handbill mentioned Starkey by name determinative of the impact of the Union’s banner which did not mention Starkey. By the terms of the parties’ stipulation the message on the banner was clearly designed to reach a much larger segment of the public than that of the Union’s handbills, which were only distributed to passersby upon their specified requests made to union agents.

ers, *Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), the issue before the Court was whether unions violated Section 8(b)(4)(ii)(B) of the Act when they limited their secondary picketing of retail stores to an appeal to customers of the stores not to buy the products of certain firms against which one of the unions was on strike. The unions used picketers wearing placards who also distributed handbills at Safeway stores asking customers not to purchase a certain brand of apples, which the Court noted was only one of numerous food products sold in the stores. The pickets were given instructions that they were forbidden from asking customers not to patronize the stores. In refusing to find a violation of the Act, the Court stated:

There is nothing in the legislative history prior to the convening of the Conference Committee which shows any congressional concern with consumer picketing beyond that with the ‘isolated evil’ of its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer. When Congress meant to bar picketing per se, it made its meaning clear; for example, Section 8(b)(7) makes it an unfair labor practice ‘to picket or cause to be picketed \* \* \* any employer \* \* \*’ In contrast, the prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise. 377 U.S. at 68.

.....

When consumer picketing is employed only to persuade customers not to buy the struck product, the union’s appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer’s purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case the union does more than merely follow the struck product; it creates a separate dispute with the struck employer. 377 U.S. at 72.

In *NLRB v. Retail Clerks Local 1001*, 447 U.S. 607, 611 (1980), a union reached an impasse during contract negotiations with Safeco, a title insurance company. The Union then picketed five title companies that derived 90 percent of their income by distributing Safeco’s products. In concluding the union’s picketing violated Section 8(b)(4) of the Act, the Court plurality stated, “the Union’s secondary appeal against the central product sold by the title companies in this case is reasonably calculated to induce customers not to patronize the neutral parties at all.” *Id.* at 615. The Court plurality found the picketing violated the Act because the picketing if successful presented the title companies with a choice between survival and severance of their ties with Safeco thereby violating the statutory ban on the coercion of neutrals with the object of forcing them to cease doing business with the primary employer. In addressing the first amendment issue, the Court plurality stated:

Although the Court recognized in *Tree Fruits* that the Constitution might not permit ‘a broad ban against peaceful picket-

ing,’ the Court left no doubt that Congress may prohibit secondary picketing calculated to ‘to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon the primary employer.’ 377 U.S., at 63. Such picketing spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951), this Court expressly held that a prohibition on ‘picketing in furtherance of (such) unlawful objectives’ did not offend the First Amendment.<sup>10</sup> See *American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215, 229-231 (1974); *Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957). We perceive no reason to depart from that well-established understanding. As applied to picketing that predictably encourages consumers to boycott a secondary business, Sec. 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech. *Id.* at 616.

Justice Stevens wrote a concurring opinion in *NLRB v. Retail Clerks Local 1001*, *supra* at 618–619, finding the picketing violated Section 8(b)(4) of the Act. Justice Stevens stated:

I have little difficulty in concluding that the restriction at issue in this case is constitutional. Like so many other kinds of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–777, Mr. Justice Douglas stated:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.<sup>7</sup>

Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban in this case affects only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea. And the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute. Because I believe that such restrictions on conduct are sufficiently justified by the purpose to avoid embroiling neutrals in a third party’s labor dispute, I agree that the statute is consistent with the First Amendment.

<sup>10</sup> In *Electrical Workers v. NLRB, supra*, there was a dispute where a contractor used a non union electrical subcontractor on a job. The electrical workers union only used a single picket, who carried a placard which read, “This job is unfair to organized labor: I.B.E.W. 501 A.F. L.” The picketing caused carpenters union members to walk off the job, and the general contractor replaced the non-union sub on the job. The Court held the Union’s conduct of peaceful picketing induced a secondary boycott in violation of Sec. 8(b)(4) of the Act, and was not protected speech under Sec. 8(c) of the Act.

Thus, Justice Stevens pointed out in his concurrence in a case involving consumer picketing that picketing sends a signal for an automatic response to customers or the general public, as well as to union members who may be working at a common site.

In *Edward J. DeBartolo Corp. V. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988), the union had a primary dispute with a construction contractor hired by one of the tenants in a mall to build a department store. The union distributed handbills at the mall informing customers that one of the stores in the mall was being built by contractors who paid their employees substandard wages and benefits and asking customers not to shop at any of the stores in the mall until the mall's owner promised all construction at the mall would be done by contractors who pay their employees fair wages and fringe benefits. In finding the union's activity to be lawful, the Court noted, "The handbills involved here truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall. The handbilling was peaceful. No picketing or patrolling was involved." *Id.* at 575-576. The Court held, "The case turns on whether handbilling such as involved here must be held to 'threaten, coerce, or restrain any person' to cease doing business with another, within the meaning of Section 8(b)(4)(ii)(B)." *Id.* at 578. The Court stated:

But more than mere persuasion is necessary to prove a violation of Section 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints. Those words, we have said, are 'nonspecific, indeed vague,' and should be interpreted with 'caution' and not given a 'broad sweep,' *Drivers, supra* 362 U.S., at 290, 80 S.Ct., at 715;" and in applying Section 8(b)(1)(A) they were not to be construed to reach peaceful recognitional picketing. Neither is there any necessity to construe such language to reach the handbills involved in this case. There is no suggestion that the leaflets had any coercive effect on customers of the mall. There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall. 485 U.S. at 578.

The Court in *DeBartolo* distinguished *NLRB v. Retail Store Employees*, *supra*, stating that the picketing there threatened the neutral with ruin or substantial loss. 485 U.S. at 579. The Court ended the *DeBartolo* decision with the following pronouncement seemingly limiting the breadth of its decision to the type of handbilling in that case. The Court stated:

At the very least, the Kennedy-Goldwater colloquy falls far short of revealing a clear intent that all nonpicketing appeals to customers urging a secondary boycott were unfair practices unless protected by the express words of the proviso. Nor does that exchange together with the other bits of legislative history relied on by the Board rise to that level.

In our view, interpreting Section 8(b)(4) as not reaching the handbilling involved in this case is not foreclosed either by the language of the section or its legislative history. That construction makes unnecessary passing on the

serious constitutional questions that would be raised by the Board's understanding of the statute. 458 U.S. at 588.

Thus, in *NLRB v. Fruit & Vegetables Packers Local 760, (Tree Fruits)*, 377 U.S. 58, 68 (1964), the Court stated conduct proscribed by Section 8(b)(4) of the Act is not limited to picketing. The Court stated "the prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." There the Court found consumer picketing at secondary employer to convince customers not to buy a struck product is closely confined to the primary dispute. In refusing to find a violation of the Act the Court distinguished the situation where picketing was designed to persuade customers not to trade at all with the secondary employer, finding that in that instance the union does more than follow the struck product but creates a separate dispute. Similarly, in *NLRB v. Retail Clerks Local 1001*, 441 U.S. 607 (1980), the Court found consumer picketing designed to cause customers not to patronize a secondary employer at all to be violative of Section 8(b)(4) of the Act. While this case involved consumer picketing, Justice Stevens, in a well cited concurring opinion, stated, "The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea. And the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute." *Id.* at 618-619. As Justice Stevens recognized, the presence of a picket line, sends a signal not just to union members working at a jobsite, but to consumers in general, who may or may not be union members, relatives of union members, or who just may have an aversion to crossing a picket line regardless of the message being disseminated by those on the line. Justice Stevens also pointed out that it is the location of the picketing at a secondary employer's site that is important. It is also not necessarily the fear of confrontation, but the symbol of what a picket line represents that can be found to be coercive under Section 8(b)(4) of the Act. For, in *Electrical Workers v. NLRB*, 341 U.S. 694 (1951), a union's use of a single picketer was found to have violated Section 8(b)(4) of the Act. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), the Court held handbilling at a mall in that instance did not violate Section 8(b)(4) of the Act. However, the Court noted the handbills informed customers that one of the stores in the mall was being built by contractors who paid substandard wages and benefits, and asked customers not to shop at the mall until the mall's owner promised all construction would be done by contractors who paid their employees fair wages and benefits. In finding the conduct was not violative of the Act, the Court stated, "The handbills involved here truthfully revealed the existence of a labor dispute. . ."

In *Sheet Metal Workers' Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199, 200 (2006), the Board found the Respondent union violated Section 8(b)(4)(ii)(B) by holding a mock funeral procession at a jobsite. The Board majority stated:

We agree with our concurring colleague as to the reasons why this conduct was picketing. However, to the extent that she implies that picketing requires a physical or symbolic barrier,

we do not necessarily agree. Since the funeral procession was such a barrier, we need not pass on whether such a barrier is a sine qua non of picketing. It may be that other conduct, short of a barrier, can be 'conduct' that is picketing or at least 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B).

In fact, the Board and courts have long held that conduct other than picketing constitutes coercive conduct within the meaning of Section 8(b)(4)(B) of the Act. In *Kentov v. Sheet Metal Workers' Local 15*, 418 F.3d 1259, 1264 (11th Cir. 2005), fn. 6, the court stated:

Coercion under Section 8(b)(4)(ii) broadly includes "nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation and pressure in the background of a labor dispute." *Carpenter Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130, fn. 2 (1992), (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964)).

The ninth circuit applied similar principles in *Associated General Contractors v NLRB*, 514 F.2d 433, 438 (9th Cir. 1975), stating:

We believe that when Congress used "coerce" in Section 8(b)(4)(B) it did not intend to proscribe only strikes or picketing, but intended to reach any form of economic pressure of a compelling or restraining nature. (Citations omitted.)

In *Wehr Constructors*, supra at 1130, the filing of internal union disciplinary charges was found to be coercive conduct. In *Local 32B-32J, Service Employees International Union, AFL-CIO v. NLRB*, 68 F.3d 490, (D.C. Cir. 1995), the court enforced a Board order finding that a union's demand for arbitration was coercive within the meaning of Section 8(b)(4) of the Act. In *Sheet Metal Workers Local 80 (Limbach Co)*, 305 NLRB 312, 314-316 (1991), enfd. in relevant part 989 F.2d 515 (D.C. Cir. 1993), a union's disclaimer of interest in representing certain employees was found to be coercive under Section 8(b)(4). In *Eis-Hokins Corp.*, 154 NLRB 839, 842 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), a threat to cancel a collective-bargaining agreement with a neutral employer was found to be coercive. In *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 826-829 (2001), enfd. 50 Fed. Appx. 88 (3d Cir. 2002), broadcasts at a jobsite at excessive volumes were found to violate the Act; and in *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436-437 (1962), a mass gathering was found to violate the Act although no picketing was conducted.

The Board has also long held conduct does not require marching back and forth to found to be unlawful picketing. In *Lawrence Typographical Union No. 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), enfd., 402 F.2d 452 (10 Cir. 1968), a respondent union hung a sign on a trailer facing a plant from which the union sought recognition. Prior to September 19, 1966, strikers engaged in ambulatory picketing. However, following September 19, the same strikers continued to show up at the plant, four at a time, parked their cars near the trailer, and spent their entire shift sitting in their cars, standing in the vicin-

ity, making trips to the trailer, walking in front of the plant and across one of its entrances. In finding this conduct constituted unlawful picketing it was stated at page 283 that:

[T]he Board and the courts have held that patrolling in the common parlance of movement and the carrying of placards, are not a sine qua non of picketing. Thus, in *Lumber and Sawmill Workers Local Union No. 2797, (Stoltze Land & Lumber Co.)*, 156 388, 394, the Board notes that the definitions of the words 'picket' and 'picketing,' set forth in Black's and Bouvier's Law Dictionaries and in Webster's New International Dictionary (2d ed.), do not include 'patrolling or the carrying of placards (as) a concomitant element.' And Mr. Justice Black, in speaking of 'picketing ... in 8(b)(4)(ii)(B),' describes the concept of 'patrolling' as encompassing 'standing or marching back and forth or round and round... generally adjacent to someone else's premises...' (Emphasis supplied.) *N.L.R.B. v. Fruit and Vegetable Packers & Warehousemen Local 760 (Tree Fruits)*, 377 U.S. 58 at 77 (concurring opinion).

In *N.L.R.B. v. Local 182, IBT (Woodward Motors)*, 314 F.2d 53 (C.A. 2), the court of appeals agreed with the Board that a union picketed when it representatives stationed themselves in automobiles parked on the shoulder of a highway adjacent to a struck plant and placed picket signs in a snow bank, explained the merits of the dispute to inquiring persons, and occasionally got out of their cars to stop deliverymen from coming on the premises. What the court said in rejecting the Union's contention that its agents' conduct did not constitute picketing, is precisely applicable to the instant case. The court stated (314 F.2d at 57-58):

Webster's new International Dictionary (2d Ed.) says that the verb 'picket' in the labor sense means 'to walk or stand in front of a place of employment as a picket' and that the noun means 'a person posted by a labor organization at an approach to the place of work....' Movement is thus not requisite, although there was some. The activity was none the less picketing because the Union chose to bisect it, placing the material elements in snow banks but protecting the human elements ... by giving them comfort of heated cars. . . .<sup>11</sup>

So in the instant case, Respondent's conduct was no less picketing because it placed a sign on the Komfy Korner which indicated the purpose of the gathering of the strikers in front of the Company's premises or made that purpose apparent by handing out 'On Strike' handbills to all strangers entering the Company's premises or on occasion by placing these handbills (which were the equivalent of the picket signs reduced in size)

<sup>11</sup> The Second Circuit went on to state in *Woodward Motors* that:

... this was still 'more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey.' *Building Service Employers' Int'l Union Local 262 v. Gazzam*, 339 U.S. 532, 537, 70 S.Ct. 784, 787, 94 L.Ed.1045 (1950). At the very least the Board did not act unreasonably in constructing 'picket', a statutory term relating to a subject within its area of special competence, to include what the Union did here. (Citations omitted.) See *NLRB v. Local 182, IBT (Woodward Motors)*, supra at 58.

against the window of their parked car so as to be visible to those entering the premises, and placed the pickets in or around the automobiles adjacent to the Company's premises.

In the *Lumber & Sawmill Workers Union* case, supra, the Board applied the following test (156 NLRB at 394):

The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.

See *Mine Workers District 2*, 334 NLRB 677, 686 (2001), holding that patrolling and patrolling with carrying placards are not essential elements of picketing. Rather, "the essential feature of picketing is the posting of individuals at entrances to a place of work." Moreover, the Board has found a union has engaged in picketing activity by the posting of stationary signs. See *Construction & General Laborers Local 301*, 260 NLRB 1311, 1312 (1982); and *Teamsters Local 182*, 135 NLRB 851, fn. 1, enf. 314 F.2d 53, 57-58 (2d Cir. 1963), where the Board stated "the act of placing the usual picket signs in the snow bank abutting Employer's premises constituted picketing within the meaning of the Act. These signs were watched by Respondent's agents from a car parked on the shoulder of an adjacent highway to make sure they were not removed or destroyed during the entire working day." See also *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999), and the cases cited therein, holding that, "It is well settled that patrolling either with or without signs is not essential to a finding of picketing."

Similarly, in *Kentov v. Sheet Metal Workers' Local 15*, 418 F.3d 1259, 1265 (11th Cir. 2005), the court held:

Although the Union did not carry traditional picket signs, it is well-settled that the existence of placards on sticks is not a prerequisite to a finding that a union engaged in picketing. E.g., *Mine Workers Dist. 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Building Co.)*, 312 NLRB 715, 743 (1993). Instead, '(t)he important feature of picketing appears to be posting by a labor organization... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.' *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.)* 156 NLRB 388, 394 (1965).<sup>12 12</sup>

In *Kentov v. Sheet Metal Workers Local*, supra, the court noted union representatives patrolled in front of a hospital for about 2 hours carrying a large coffin, and played funeral music from

<sup>12</sup> In *Kentov v. Sheet Metal Workers Local 15*, supra at 1264, fn. 7, the court distinguished *Overstreet v. Carpenters & Joiners of America*, Local 1506, 409 F.3d 1199 (9th Cir. 2005) from the facts in *Kentov*. I do not find here that the *Kentov* court was adopting the ninth circuit's rationale in *Overstreet*, as opposed to explaining why the *Overstreet* decision was not dispositive of the facts in *Kentov*.

large speakers. The funeral procession was orderly, and ingress and egress to the hospital was not blocked. The court held "our focus is whether the Union threatened, coerced or restrained the hospital within the meaning of the NLRA". Id. at 1263-1264. The court held, "This activity could reasonably be expected to discourage persons from approaching the hospital, to the same degree, if not more, as would five union agents carrying picket signs." The court stated:

One of the Union's objectives in staging the procession was to exert pressure on the hospital to cease doing business with the non-union contractors, with whom the Union had a primary labor dispute. Under these facts, we hold that there is reasonable cause to believe that the Union violated Section 8(b)(4)(ii)(B) of the NLRA.<sup>13 13</sup> Id. at 1265-1266.

In *Nashville Bldg. & Constr. Trades Council*, 188 NLRB 470, 471 (1971), a Section 8(b)(4)(ii)(B) violation of the Act was found. There, Castner-Knott, a retail store, contracted with McCrory, a non union contractor to build one of Castner-Knott's facilities. In that case, the Board held "Respondent (union) went beyond the limits permitted by the Act when it in effect picketed Castner-Knott's customer entrances with appeals for a general consumer boycott, with an object of forcing or requiring Castner-Knott to cease doing business with nonunion contractors, particularly, McCrory." The Board noted, "Respondent's appeals were not limited to such Castner-Knott merchandise as was produced, or distributed to Castner-Knott, by McCrory. Indeed, no such merchandise existed. Nor were the appeals made merely by publicity other than picketing. It is clear, therefore that neither of the exempting provisos referred to above is applicable in this case." The Board cited *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 for the proposition of proscribing:

... such consumer picketing as we have here, since the picketing was not limited to the merchandise produced or distributed to the retail store by another person with whom the union had a legitimate primary labor dispute. The Court stated (at p.63) that a 'union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary to cooperate with the union ...

In *Meat & Allied Food Workers Local 248*, 230 NLRB 189, fn. 3 (1977), enf. 571 F.2d 587 (7th Cir. 1978), it was stated:

It is well established that the union engaging in consumer product picketing has the burden of insuring that its actions do not affect the secondary employer's business beyond the sale of the primary product, and that a union cannot shift its burden of struck product identification to the public. *Atlanta Typographical Union NO. 48 (Times-Journal, Inc.)*, 180 NLRB 1014 (1970); see also *Bedding, Curtain & Drapery Workers Union, Local 140, United Furniture Workers of America*,

<sup>13</sup> While the union in *Kentov* raised a First Amendment defense, the court in *Kentov* found their holding was buttressed by a recent holding of an administrative law judge that the union's conduct constituted a secondary boycott. Id. at 1266, fn. 8.

*AFL-CIO (U.S. Mattress Corp.)*, 164 NLRB 271 (1967). In the instant case both McDonald's and the Sentry Stores sold meats other than that produced by MIMPA members. References to scab meat or scab beef were not sufficient to advise customers as to the products they were not to buy, or the name of the primary employer. Contrary to our dissenting colleague's assertion, the distribution of leaflets which identified the primary employer and the struck product do not cure the picketing. 'The realities of the situation demand that the legality of the Union's appeal be judged by a reading of the signs. The prohibitions of 8(b)(4)(B) are applicable unless the picket signs themselves adequately inform potential customers of the actions they are asked to take.' *Atlanta Typographical Union*, supra at 1016.

See also *San Francisco Typographical Union No. 21*, 188 NLRB 673, 680 (1971), enfd. 465 F.2d 53 (9th Cir. 1972), holding that permissible product picketing is limited to products adequately identified on the picket sign, and cannot encompass the entire business of the secondary employer; and *Salem Building Trades Council*, 163 NLRB 33, 36 (1967), enfd. 388 F.2d 987 (9th Cir. 1968), where a violation was found where picketing was not sufficiently identified to the primary employer, and where the construction had ended but the picketing had a goal of preventing secondary employers from engaging in future business with the primary employer who was the construction contractor.

I find the Union engaged in an unlawful secondary boycott against Goodell in violation of Section 8(b)(4)(ii)(B) by engaging in coercive picketing beginning on August 9, and continuing thereafter when it posted a 20 by 4 foot banner near the entrance to Goodell's office building reading, in large print, "Shame On Goodell DeVries, Leech & Dann, LLP" appearing with the words "LABOR DISPUTE," manned by two to four union agents. The evidence reveals the Union engaged in ambulatory picketing at the site, during the time period of May 26 to July 15, against primary employer Starkey, with picket signs reading, "Starkey Construction Company, Incorporated does not pay the area standard wage and benefits, the Mid-Atlantic Regional Council of Carpenters." The signs also contained the statement, "We have a labor dispute with the above-named company. We are appealing only for the public, the consumer. We are not seeking to induce any person to cease work or refuse to make delivery." The Union's picketing activity against Starkey included a large inflatable rat about a story and one half tall, sitting in a truck. Picketers walked in an oval line chanting, "Who's the rat? Starkey. Where's the rat? South Street." Goss credibly testified he heard Goodell's name being used in the chant on one occasion. The Union continued its picketing activity at the site, during the period of July 18 to August 5. The Union used the same picket sign, but substituted the name Wilhelm for Starkey.<sup>14</sup> Thus, the Union engaged in aggressive

ambulatory picketing near the entrance to Goodell's office building during the period of May 26 to August 5.

On August 9, the Union ceased its ambulatory picketing at the site, but continued with its course of conduct by posting a large sign near the entrances to Goodell's office building naming secondary Goodell the target of its labor dispute, while omitting reference to Starkey, the primary employer. The banner was accompanied by two to four union agents. While the Union was notified on October 25, that Starkey had completed its work at the site, the Union's posting of the banner continued thereafter, and was ongoing at the time of the unfair labor practice trial on December 21. I find the Union's banner was a form of picketing and that it was a continuation of its prior picketing activity, and that it was coercive conduct against a secondary or neutral employer in violation of Section 8(b)(4)(ii)(B) of the Act. In *NLRB v. Fruit & Vegetables Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 77 (1964), Justice Black, in a concurring opinion concerning picketing stated the concept of "patrolling" encompasses "standing or marching back and forth or round and round... generally adjacent to someone else's premises..." (Emphasis supplied.) Similarly, the Board and some courts have held that patrolling and carrying placards are not essential elements of picketing. See, *Mine Workers District 2*, 334 NLRB 677, 686 (2001); *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999); *Construction & General Laborers Local 301*, 260 NLRB 1311, 1319 (1982); *Lawrence Typographical Union No. 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), enfd., 402 F.2d 452 (10 Cir. 1968); *Lumber and Sawmill Workers Local 2797, (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394; and *Local 182, Teamsters, Etc.* 135 NLRB 851, fn. 1, enfd. 314 F.2d 53, 57-58 (2d Cir. 1963). Cf. *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199, 200 (2006); and *K Mart Corp.*, 313 NLRB 50, 53 (1993) which viewed the totality of union's conduct which included the posting of banners as picketing.

I also find the Union's picketing by use of its large banner manned by union agents near the entrance to Goodell, a neutral employer's offices, was coercive in that by the terms of its sign, the Union was seeking a total consumer boycott of Goodell's services. The banner states Goodell was the subject of a labor dispute without further explanation to the public. The banner did not name primary employer Starkey, and it remained posted and attended by agents of the Union long after Starkey's work had been completed at the site. In similar circumstances, the Board has held that a union is engaged in an unlawful consumer boycott of the secondary employer, because the union is not confining its dispute to the product sold or produced by the primary employer, and as far as the public is aware the Union is seeking a total boycott of the services of secondary or neutral employer Goodell. See, *Loc. 248 Meat & Allied Food Workers*, 230 NLRB 189, fn. 3 (1977), enfd. 571 F.2d 587 (7th Cir. 1978); *Nashville Bldg. & Constr. Trades Council*, 188 NLRB 470, 471 (1971); *San Francisco Typographical Union No. 21*, 188 NLRB 673, 680 (1971), enfd. 465 F.2d 53 (9th Cir. 1972); and *Salem Building Trades Council*, 163 NLRB 33, 36 (1967)

<sup>14</sup> Eisner testified Wilhelm did not perform work for Goodell's construction, but was working for another tenant in the building. I do not find this to be determinative, as members of the public would have no way of knowing this, and all passersby would observe was the Union engaging in ambulatory picketing at the site during the period of May 26 to August 5.

enfd. 388 F.2d 987 (9th Cir. 1968).<sup>15</sup> The Union's conduct had an even greater impact on Goodell than just loss of future business, because as Goss credibly testified clients of Goodell who continued to use the law firm's services had the possibility of having those services compromised in litigation at the nearby Courthouse as a result of the Union's actions.

If the Board were to conclude the Union did not engage in picketing here, I would still find that the posting of its large banner, accompanied by two to four union agents, coming on the heels of lengthy ambulatory picketing at the site, and omitting from the banner that Starkey was the subject of its labor dispute, constituted coercive conduct against Goodell. The posting of a banner at Goodell's premises that is much larger than the ordinary picket sign, accompanied by two to four union agents, constitutes a form of conduct by the Union that is more compelling than handbilling, for otherwise the Union would have merely handbilled. Rather, a large sign manned by union agents stating "shame on" Goodell with the words "labor dispute," could only be read by passersby that the Union was seeking a boycott of Goodell's services. In this regard the banner, as does the traditional picket sign, sent a signal to members of the public not to use Goodell's services since the banner failed to truthfully advise the public that the Union's primary dispute was with Starkey, or even name Starkey. Since by the terms of the parties' stipulation, the banner could be held in place by two union agents, using up to four union agents at a time was clearly designed to accomplish more than a mere posting, but rather was designed to create a presence at the site. I find the banner was coercive by design in that the Union was intentionally mimicking traditional picketing close to the entrance of Goodell's office building, and thereby sending the same signal as picketing to consumers to avoid Goodell's services. I find the Union's conduct here was more coercive in certain ways than a traditional picket line, which can be manned by as little as one person, in that by the sheer size of the banner it could be read by many more people than the traditional picket sign. I find the Union's banner activity is ingenious conduct by the Union designed to replicate traditional picketing at the site of a neutral employer, with the purpose of coercing Goodell by loss of business and by compromising Goodell's product, which is legal services, into refraining from doing business with Starkey. It is plainly coercive conduct by the Union, designed to circumvent the secondary boycott provisions of the Act. See *Kentov v. Sheet Metal Workers' Local 15*, 418 F.3d 1259, 1265–1266 (11th Cir. 2005).

In sum, I find the Union's conduct in posting of the large banner, accompanied by two to four union agents, at the premises of a neutral employer Goodell, while omitting name of the company with which the Union had a primary labor dispute from the banner was coercive conduct designed to enmesh Goodell in the Union's labor dispute with Starkey and was conduct violative of Section 8(b)(4)(ii)(B) of the Act, whether or not it is concluded the Union was engaged in formal picket-

<sup>15</sup> The Union's distribution of handbills naming Starkey as the subject of its distribute does not remedy the omission of Starkey's name from the Union's banner. See, *Loc. 248 Meat & Allied Food Workers*, supra, at 189, fn. 3.

ing by its actions, although I have also concluded the Union did engage in picketing by its actions. It is by now clear that coercive conduct within the meaning of that section of the Statute is not limited to picketing. See, *NLRB v. Fruit & Vegetables Packers, Local 760, (Tree Fruits)*, 377 U.S. 58, 68 (1964); *Service Employees v. N.L.R.B.*, 68 F.3d 490 (D.C. Cir. 1995); *Kentov v. Sheet Metal Workers' Local 15*, 418 F.3d 1259, 1264 (2005), fn. 6; *Sheet Metal Workers' Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199, 200 (2006), *ssociated General Contractors v NLRB*, 514 F.2d 433, 438 (1975); *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 826-829 (2001), enfd. 50 Fed Appx. 88 (3d Cir. 2002); *Carpenter Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130, fn. 2 (1992); *Local 32B-32J, Sheet Metal Workers' Local 80 (Limbach Co)*, 305 NLRB 312, 314–316 (1991), enfd. in relevant part 989 F.2d 515 (D.C. Cir. 1993); *Ets-Hokins Corp.*, 154 NLRB 839, 842 (1965), enfd. 405 F.2d 159 (9th Cir. 1968); and *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436–437 (1962). Since I find the Union's posting a large banner at the site of a neutral employer, manned by union agents, while omitting the name of the primary employer from the banner is an effort to replicate a more traditional picket line and was conduct designed to coercively enmesh Goodell in the Unions' dispute with Starkey, I do not find the statutory prohibition of that conduct runs counter to the First Amendment. In fact, the Union has handbills at the site which truthfully advise the public of its dispute with Starkey asking to consumers to contact Goodell regarding that dispute. The General Counsel has not issued complaint against the Union for the distribution of those handbills at the site because it is that conduct which was sanctioned by the Supreme Court's *DeBartolo* decision.

The Union, in its brief, places great reliance on the court's two to one majority decision in *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1208 (9th Cir. 2005), (*Overstreet*), denying the Region's request for Section 10(l) injunctive relief in a Carpenters Union banner case.<sup>16</sup> The court majority in *Overstreet* stated, "We conclude that interpreting Section 8(b)(4)(ii)(B) to prohibit the Carpenters' activity would pose a 'significant risk' of infringing First Amendment rights." *Id.* at 1212. The court majority stated, "In the absence of any clear basis for construing Section 8(b)(4)(ii)(B) as covering bannering generally, *Overstreet* can prevail only if the Carpenters' actions in particular were sufficiently 'intimidating,' *DeBartolo*, 485 U.S. at 580, to 'threaten, coerce or restrain' potential

<sup>16</sup> As set forth above, while that decision is instructive, it is not binding on me because I am bound by Board law, and the statutory scheme calls for litigation before Board as reviewed *Association Local 15*, 418 F.3d 1259, 1262-63 (2005); and *NLRB v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 681–682 (1951). Mover, the *Overstreet* case involved facts different from those in the present case as the court majority noted the Carpenters Union there placed banners at significant distances from the majority of involved retail establishments, scores if not hundreds of feet, and there was no finding there by the court that the union had engaged in ambulatory picketing at the site before posting the banners.

customers of the Retailers.” Id. at 1213.<sup>17</sup> The court majority also found the General Counsel erred by labeling the Carpenter’s conduct as “signal picketing” stating that conduct constitutes an implicit instruction to union members, including employees of secondary businesses, and free speech protections do not apply to a mere signal to members, or to members of affiliates to engage in an unfair labor practice such as a strike proscribed by Section 8(b)(4)(ii)(A). The court majority stated that to turn the definition of signal picketing to include any passerby would turn the specialized concept of any signal picketing into a category synonymous with any communication requesting support for in a labor dispute. Id. at 1215–1216. The court majority in *Overstreet* also rejected the General Counsel’s argument that the Union’s only using the name of the retailer and the term labor dispute on the Union’s banner was fraudulent because it implied to the public that the Carpenters had a primary labor dispute with the retailers. The court majority concluded the term labor dispute is not limited to a dispute with a primary employer citing the definition for labor dispute in Section 2(9) of the Act. The court majority concluded that since the union had a labor dispute with the retailer for using contractors paying below rate, the unions’ banner did not contain false statements.

I respectfully take issue with several of the conclusions reached by the court majority in *Overstreet*. In making the assertion that the General Counsel could only prevail only if the Carpenters’ actions in particular were sufficiently ‘intimidating,’ to ‘threaten, coerce or restrain’ potential customers of the Retailers,” the court majority failed to address whether the loss of business as a result of the signal and/or presence of bannering activity would coerce or restrain a neutral employer. See, *Kentov v. Sheet Metal Workers’ Local 15*, supra at 1265–1266. For example, it was not the picketing alone that was found to violate the Act in *NLRB v. Retail Clerks Local 1001*, 447 U.S. 607, 611 (1980). There, the Court plurality stated, “the Union’s secondary appeal against the central product sold by the title companies in this case is reasonably calculated to induce customers not to patronize the neutral parties at all.” Id. at 615. It was the totality of the conduct that was considered by the Court, including the message, that warranted the finding of a statutory violation. This is illustrated by the prior finding in *NLRB v. Fruit & Vegetables Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), holding consumer picketing against neutral employers limited to appeals to customers not to purchase specified products was found not to violate the Act. In both instances, there was picketing, but it was not the picketing that determined whether a violation occurred. Rather, it was the impact of that picketing based on the message as to whether it coerced or restrained the neutral employer which was the determining factor with the goal of causing that employer to cease

<sup>17</sup> In making this assertion, the court majority in *Overstreet* rejected the contention that the union’s bannering activity constituted picketing. However, for the reasons and case law set forth above, I have reached an opposite result concluding the bannering activity here did constitute picketing, and even if not it constituted more conduct coercive than handbilling.

doing business with the primary employer. See *Meat & Allied Food Workers Local 248*, 230 NLRB 189 fn. 3 (1977), enfd. 571 F.2d 587 (7th Cir. 1978); *Nashville Bldg. & Constr. Trades Council*, 188 NLRB 470, 471 (1971); *San Francisco Typographical Union No. 21*, 188 NLRB 673, 680 (1971), enfd. 465 F.2d 53 (9th Cir. 1972); and *Salem Building Trades Council*, 163 NLRB 33, 36 (1967) enfd, 388 F.2d 987 (9th Cir. 1968).

I find, as set forth above, that the posting of a large sign manned by two to four union agents near the entrance of a business naming that business as the subject of a labor dispute sends a signal to members of the public that the Union is picketing that business, and unless otherwise explained by the sign, seeking a total boycott of that business.<sup>18</sup> I attribute more to the general public than the *Overstreet* majority was willing to do, in that I find that most passersby understand the symbolic concept of picketing, and that many will react to that concept rather than the actual message being broadcast. I find the posting of a large sign at the situs of a dispute, manned by union members, is conduct that is a form of picketing and would be recognized as such by the general public. I find the posting of the sign would send a signal to most members of the public that the Union was asking them to honor a picket line against the named entity. As Justice Stephens stated in *NLRB v. Retail Clerks Local 1001*, 441 U.S. 607, 618–619, (1980), a case involving consumer picketing, “the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.” Justice Stevens went on to state, “The statutory ban in this case affects only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.”

I also respectfully take issue with the *Overstreet* majority’s application of the term “labor dispute” to secondary employers in the Section 8(b)(4) context. In *Sheet Metal Workers’ Local 7* 345 NLRB 1322, 1324 (2005), the Board gave the following definition of the term “labor dispute” as referred to under Section 8(b)(4)(ii)(B) of the Act:

The Act draws a distinction between picketing directed at a primary employer—an employer with whom the union has a **labor dispute**—and picketing directed at a neutral or **secondary** employers who have no dispute with the union in order to force those employers to stop doing business with the primary employer. Section 8(b)(4)(ii)(B) ‘makes it unlawful for a labor organization or its agents to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring any person to cease doing business with any other person.’ (Citations omitted.)<sup>19</sup>

<sup>18</sup> Since I find the Union’s omission of the Starkey’s name from its banner was a component of its coercive conduct towards Goodell, I do not need to address the General Counsel’s alternative contention in the complaint that such omission constituted fraudulent speech.

<sup>19</sup> In, *Sheet Metal Workers’ Local 7* supra at 1324, the Board repeated the *Moore Dry Dock* standards, for lawful primary picketing, one of which is “the picketing discloses clearly that the dispute is with the primary employer.” In the instant case, the Union cites *Service Employees Local 399 (Delta Air Lines)*, 293 NLRB 602 (1989), for the

In my view the Board's definition is consonant with the Supreme Court's statement regarding the purpose of Section 8(b)(4) of the Act, which was enacted through amendments to the Statute, and subsequent to the definition in Section 2(9) of the Act. Thus, the Court has stated that Section 8(b)(4) reflects, "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). Thus, the dissent in the *Overstreet* case asserted the Regional Director had sufficient likelihood of prevailing on the fraudulent speech claim to warrant a granting of a preliminary injunction under the ALJ's finding and decision. The dissent stated:

Many people, because of their sympathies or their obligations as union members, will not patronize firms whose employees are engaged in disputes over union recognition or terms of employment. See, *Overstreet v. United Brotherhood of Carpenters and Joiners of America, Local Union No.1506*, supra at 1219.

The dissent noted the union continued to post its banners long after the firms had finished their work and left, "so the banners and their 'shame' message were present even when there was no work going on at the sites to which the union had any objection." *Id.* at 1219. The dissent noted, citing the opinion of the administrative law judge in that case, that the only message that could reasonably be conveyed to readers of the banners was that the respondent unions had primary labor disputes with neutrals named on the banners and that those neutrals were not treating their employees properly. The dissent quoted the administrative law judge in concluding the union had the intent of causing targeted neutral employers such discomfiture through the banners that persons would cease doing business with primary employers or influence other neutral employers or persons to cease doing business with primary employers.

In sum, I find the Union is engaged in an unlawful secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act against Goodell by the posting of a large banner, manned by two to four union agents, near the entrance to Goodell's premises labeling Goodell, a neutral employer, as the subject of a labor dispute, omitting Starkey's name from the banner, and maintaining that banner long after Starkey, the employer with which the Union had the dispute had ceased work at the site. The Union's conduct was picketing or other coercive conduct as it sent a strong signal to members of the public to engage in a boycott of Goodell's services, particularly here where the Union's large

proposition that omitting the name of the primary employer from the Union's banner was lawful. However, the Board has made clear the standards set forth in the *Delta Airlines* case apply only to lawful hand-billing. See, *Service Employees Local 254 (Womens & Infants Hospital)*, 324 NLRB 743, 749 (1997), noting, "the carrying or wearing signs and placards places Respondent's activities beyond the mere dissemination of ideas. Whether intended or not, the signs may induce action by employees or students without regard to their message." See also, *Teamsters Local 917 (Industry City)*, 307 NLRB 1419, fn. 3 (1992).

banner failed to explain that its labor dispute was with Starkey, the primary employer. The Union's conduct occurred against the backdrop in which it had previously had engaged in lengthy and aggressive ambulatory picketing at the site, and it not only served as a signal to potential customers who used the law firms services, but it impacted on the ability of the law firm to perform those services for clients who remained loyal to the law firm.

#### CONCLUSIONS OF LAW

1. Respondent, Mid-Atlantic Regional Council of Carpenters, by picketing at the Alex Brown Building, One South Street, Baltimore, Maryland, from August 9, 2005, and thereafter, with a banner which failed to identify Starkey Construction Co., Inc. as the employer with which the Union had a primary labor dispute, engaged in coercive conduct with an object of placing pressure on Goodell, DeVries, Leech & Dann, LLP, and other persons, to cease doing business with Starkey Construction Co., Inc., in violation of Section 8(b)(4)(ii)(B) of the Act.

2. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

#### ORDER

Respondent, Mid-Atlantic Regional Council of Carpenters, its officers, agents, and representatives, shall:

1. Cease and desist from

(a) Picketing, or by any like or related conduct, including erecting and displaying a banner, threatening, coercing, or restraining, Goodell, DeVries, Leech & Dann, LLP, or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to place pressure on Goodell, DeVries, Leech & Dann, LLP, or any other person, to cease doing business with Starkey Construction Co., Inc., or any other person.

2. Take the following affirmative actions.

(a) Within 14 days after service by the Region, post at its union office in Baltimore, Maryland, copies of the attached notice marked "Appendix"<sup>21</sup> on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

<sup>20</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.

<sup>21</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former members at any time since August 9, 2005.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Goodell, DeVries, Leech & Dann, LLP, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 2, 2006

APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT by picketing, or by any like or related conduct, including erecting and displaying a banner, threaten, coerce, or restrain Goodell, DeVries, Leech & Dann, LLP, or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to place pressure on Goodell, DeVries, Leech & Dann, LLP, or any other person, to cease doing business with Starkey Construction Co., Inc. or any other person.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights guaranteed you by Section 7 of the Act

MID ATLANTIC REGIONAL COUNCIL OF CARPENTERS -