UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-1028, 06-1072

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 15, AFL-CIO

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

ENERGY AIR, INC. and GALENCARE, INC., d/b/a BRANDON REGIONAL MEDICAL CENTER

Intervenors

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Sheet Metal Workers' International Association, Local 15, AFL-CIO ("the Union") to review, and the cross-application of the National Labor Relations Board to enforce, a Board order against the Union. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended ("the Act").[1] The Decision and Order, issued on January 9, 2006, and reported at 346 NLRB No. 22 (A 420-39),[2] is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3]

The Union filed a petition for review of the Board's Order on January 18, 2006, and the Board cross-applied for enforcement of its Order on February 17. On March 16, 2006, the charging parties before the Board, Energy Air, Inc. ("Energy Air") and Galencare, Inc., d/b/a Brandon Regional Medical Center ("the Hospital"), filed motions to intervene on the side of the Board, which this Court granted on April 12. That same day, the Court granted the motion of Associated Builders and Contractors for leave to participate and to file a brief as amicus curiae

---

1 29 U.S.C. § 151, 160(a).

2 "A" refers to the Appendix to Briefs. Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

3 29 U.S.C. § 160(e) and (f).

in support of the Board. On May 25, 2006, the Court granted Greenpeace USA leave to file a brief as amicus curiae in support of the Union. The Court has jurisdiction over the Company's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act.[4] Both were timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board reasonably found that the Union violated Section 8(b)(4)(ii)(B) of the Act by issuing a secondary threat to Beall's.

2. Whether the Board reasonably found that the Union violated Section 8(b)(4)(ii)(B) of the Act by conducting secondary picketing, in the form of a mock funeral, outside the Hospital.

3. Whether the Board reasonably found that the Union violated Section 8(g) of the Act by failing to give the Hospital advance notice of the mock funeral.

4. Whether the Board appropriately exercised its discretion in issuing a narrow cease-and-desist order to remedy the Union's secondary-picketing violation.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are appended to the Union's brief.

---

[4] *Id*.

STATEMENT OF THE CASE

This unfair labor practice case came before the Board on a consolidated complaint issued by the Board's General Counsel on July 29, 2004, pursuant to charges filed by Energy Air and the Hospital. (A 432; 363-73, 377, 381, 385, 390, 394, 398.) Following a hearing, an administrative law judge issued a decision on December 7, 2004, finding that the Union had committed several violations of Section 8(b)(4)(ii)(B) of the Act,[5] as well as a violation of Section 8(g) of the Act.[6] (A 438.) The Union, Energy Air, and the General Counsel each filed exceptions to parts of the judge's decision. (A 430.)

On January 9, 2006, the Board (Chairman Battista and Member Schaumber; Member Liebman, concurring in part) issued a Decision and Order, affirming the judge's findings that the Union had violated Section 8(b)(4)(ii)(B) by picketing at the Hospital with the object of forcing the Hospital to cease doing business with Massey Metals, Inc. ("Massey") and Workers Temporary Staffing ("WTS") in March 2004, and by unqualifiedly threatening to picket Beall's, Inc. ("Beall's") with the object of forcing Beall's to cease doing business with Energy Air. The Board further affirmed the judge's finding that the Union violated Section 8(g) by failing to give the Hospital advance notice of the March 2004 picketing, but

---

5 29 U.S.C. § 158(b)(4)(ii)(B).

6 29 U.S.C. § 158(g).

rejected or found it unnecessary to reach the judge's remaining recommended findings. (A 430-31.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Union had ongoing labor disputes with a number of non-union sheet-metal contractors, including Energy Air and Massey, and with WTS, an employment agency that supplied employers, such as Massey, with temporary workers when needed. (A 432-34; 53, 55, 104-05.) It objected to the non-union employers' low wages and benefits, which put downward pressure on the local prevailing wage. (A 105, 109.) It is undisputed that the Union did not represent, or seek to represent, employees of either the Hospital or Beall's. (A 11, 24, 78, 163.)

B. The Union Threatens Beall's with Picketing To Protest against Energy Air

On September 26, 2003, Union Organizer Samuel McIntosh wrote a letter to the president of Beall's, Steven Knopik, informing him that the Union had an ongoing labor dispute with Energy Air. In the letter, the Union asserted that Energy Air had been charged with, and was being investigated for, serious federal-law violations. The Union also stated its understanding that Energy Air was working on construction projects for Beall's, and notified Beall's that:

> The union will be compelled to publicize our dispute with Energy Air by the way of leafleting, protesting, and the possibility of picketing at the sites.

McIntosh ended the letter with an offer to answer any questions Knopik might have. (A 433; 66, 406.)

C. The Union Pickets the Hospital To Protest against Massey and WTS

In March 2004, the Hospital had a construction project underway on its property. One of the contractors on the job was Massey, which used WTS-supplied day laborers. (A 434; 56, 78, 203-04.) To express its dissatisfaction with the Hospital's use of non-union sheet-metal contractors, and to encourage the Hospital to use union contractors in the future, the Union decided to stage a "street theater" protest in front of the Hospital. The Union chose to focus its protest on the Hospital's malpractice problems, which the Union considered additional evidence of the same corporate greed that led the Hospital to employ non-union contractors. (A 435-36; 144, 159-60, 185, 188-89.)

On March 15, without prior notice to the Hospital, the Union staged a mock funeral on the sidewalk along Oakfield Drive, which passes in front of the Hospital's most frequented entrance. (A 435-36; 13, 25, 68, 211-13.) As the Union's audio system pumped out music, four union members, including an organizer and the Union's business agent, served as pallbearers for a fake but realistic-looking coffin, walking a circuit that ran back-and-forth along Oakfield

Drive. They started near one end of the semi-circular driveway leading from the street to the Hospital and proceeded about 500 feet, crossing the other driveway entrance in the process, then returned, stopping for traffic signals as appropriate. (A 435-36; 73, 75, 146-48, 184-85, 346.) Organizer McIntosh's stepson, dressed in an 8-foot grim reaper costume – including an authentic-looking plastic scythe – completed the funeral "procession." (A 435; 74-76, 135.)

The Union staged the funeral protest over a period of approximately two hours, from noon to 2 p.m., with periodic breaks. The procession was actually in progress about half of that time. (A 436; 74-75, 135-36, 215.) During the entire time, additional union protesters distributed four leaflets, each of which highlighted a different malpractice suit against the Hospital. Across the top of each leaflet, in large bold-type letters, ran the caption: "GOING TO BRANDON REGIONAL HOSPITAL SHOULD NOT BE A GRAVE DECISION." Under the caption, each leaflet had a black-and-white silhouetted image of pallbearers carrying a casket in a cemetery, followed by the details of a particular malpractice case. Finally, each leaflet ended with language characterizing it as a "public service message from the Sheet Metal Workers' International Association." (A 436; 74, 76-77, 410-13.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found (A 430-31), in agreement with the administrative law judge, that the Union violated Section 8(b)(4)(ii)(B) of

the Act by threatening to picket Beall's.[7] (A 430.) The Board also affirmed the judge's findings that the Union violated the same section of the Act by picketing at the Hospital – in the form of a mock funeral – and violated Section 8(g) of the Act by failing to give the Hospital advance notice of the picketing. (A 430-31.) The Board reversed the judge, however, to the extent he found the leafleting accompanying the funeral to be unlawful, noting that the General Counsel had not alleged, and had affirmatively disavowed, any suggestion that the leafleting was unlawful. (A 431.) Finally, the Board found it unnecessary to reach the issue of whether the Union's January 2003 leafleting methods and display of a large, inflatable rat near the Hospital violated Section 8(b)(4)(B)(ii) of the Act, concluding that such violations would be cumulative and would not affect the Order. (A 431 n.3.)

To remedy those unfair labor practices, the Board's order requires the Union to cease and desist from: unqualifiedly threatening to picket with the object of forcing Beall's to cease doing business with Energy Air; picketing the Hospital with the object of forcing the Hospital to cease doing business with Massey and WTS; and failing to give notice to the Hospital of its intention to picket the

---

[7] The Board also affirmed the judge's dismissal of the unfair-labor-practice allegation involving a similar letter to CVS. (A 430.)

Hospital. (A 431, 439.) Affirmatively, the Board's order requires the Union to post a remedial notice. (A 431-432, 439.)

SUMMARY OF ARGUMENT

The Union ran afoul of the Act when it attempted to achieve its goals, not by pressuring the primary employers with whom it had ongoing labor disputes, but by pressuring neutral employers to stop doing business with those primaries. Once a union reaches out to embroil neutral parties in its labor disputes, it becomes subject to stringent regulation designed to shield neutrals from much of that pressure. In this case, the Union's secondary efforts clumsily stepped on too many neutral toes, leading to several violations of the Act.

Briefly, under Section 8(b)(4)(ii)(B) of the Act, a union may not threaten or coerce a neutral with the object of forcing the neutral to stop doing business with a primary employer, the true source of the union's discontent. Should a union decide to rely on secondary pressure, it must achieve its ends through persuasion alone, without resorting to threats or other coercion. Moreover, if the neutral is a healthcare institution, the union must also take note of Section 8(g) of the Act, which requires unions to notify healthcare institutions in advance of protests directed against those entities. While the Union musters a variety of arguments in its brief, it fails to undermine those basic principles of applicable law.

Meanwhile, the material facts of the case are essentially undisputed. Without providing any notice, the Union conducted a mock funeral outside the Hospital's main entrance with the admitted objective of forcing the Hospital to cease business dealings with two non-union contractors. Those contractors were working on a hospital addition in a construction site behind the Hospital that was removed from the targeted entrance. The funeral involved patrolling back-and-forth in front of the Hospital's entrance, a hallmark of traditional picketing and a type of conduct singled out by the Supreme Court as potentially coercive.

In a separate incident, the Union sent a letter to Beall's, a neutral in its dispute with primary Energy Air, a non-union contractor. In the letter, the Union threatened to picket a multiemployer jobsite should Beall's employ Energy Air on the job. The threat in the letter contained no qualifications suggesting that the Union intended to target only Energy Air, rather than the jobsite as a whole.

In light of the above-described facts and law, the Board reasonably found that the Union's threat to Beall's violated Section 8(b)(4)(ii)(B), as did the mock funeral that the Union conducted in front of the Hospital. The Board further reasonably found that the Union violated Section 8(g) by failing to give the Hospital advance notice of its protest. Finally, there is no merit to the Union's challenge to the portion of the cease-and-desist Order barring it from picketing the Hospital to coerce the Hospital into stopping its business dealings with Massey and

WTS. The Board reasonably exercised its remedial discretion by issuing that narrowly tailored remedial Order to address the violation found.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law."[8] The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.[9] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."[10] Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*.[11] Moreover, the Court "traditionally defer[s] to the Board's factual determination of intent, where its expertise is clearly

---

[8] *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted).

[9] 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995).

[10] *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion.").

[11] *See Universal Camera*, 340 U.S. at 488.

employed,"[12] but does not defer when interpreting Supreme Court precedent, particularly regarding constitutional concerns.[13] Finally, the Board's remedial decisions are subject to review only for abuse of discretion.[14]

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT BY ISSUING A SECONDARY THREAT TO BEALL'S

A. An Unqualified Threat To Picket a Company in Order to Force It To Cease Doing Business with Another Is Unlawful

Section 8(b)(4)(ii)(B) of the Act makes it unlawful for a union to "threaten . . . any person engaged in commerce" for the purpose of "forcing or requiring any person . . . to cease doing business with any other person."[15] That section is

---

[12] *California Cartage Co. v. NLRB*, 822 F.2d 1203, 1208 (D.C. Cir. 1987) (citation omitted) (hot-cargo-provision case). *Accord Sheet Metal Workers Local 91 v. NLRB*, 905 F.2d 417, 422 (D.C. Cir. 1990) (same); *see also Laro*, 56 F.3d at 229 (D.C. Cir. 1995) (failure-to-consider-or-hire case).

[13] *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

[14] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) ("The Court has repeatedly interpreted [Section 10(c) of the Act, 29 U.S.C. § 160(c)] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").

[15] 29 U.S.C. § 158(b)(4)(ii)(B).

intended to shield "neutral" or "secondary" employers, with whom a union has no direct labor dispute (such as Beall's), from some of the effects of the union's legitimate labor disputes with "primary" employers (such as Energy Air).[16] Often, as in this case, Section 8(b)(4)(ii)(B) issues arise in "common situs" situations, where primary and neutral employers share a jobsite and the union's right to protest conflicts with the neutrality of the secondary employer.[17] To define what constitutes an unlawful threat in such cases, it is essential to distinguish between lawful and unlawful common-situs picketing.

In *Sailors Union of the Pacific (Moore Dry Dock Co.)*, the Board set forth standards for a union's common-situs protest to qualify as presumptively "primary," and thus lawful.[18] Those standards essentially require that the union target the primary employer as exclusively as possible, for example, by requiring that picketing occur within reasonable proximity to the actual site of the primary's

---

[16] *See NLRB v. Retail Clerks Local 1001 (Safeco)*, 447 U.S. 607, 612 (1980); *see also* cases cited in note 22, *infra*.

[17] *See Andy J. Egan Co.*, 345 NLRB No. 119 (2005), 2005 WL 3662599, *3; *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 548-49 (1950).

[18] 92 NLRB at 549 ("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 time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.") (footnotes omitted).

work at the common situs. If a union's picketing fails to meet the *Moore Dry Dock* standards, the Board and this Court will presume that the picketing has a proscribed secondary motive, although the union may still present rebuttal evidence demonstrating that the picketing is in fact primary.[19]

The above-described standards are relevant not only for determining whether picketing is primary or secondary, but also factor into the Board's determination of whether a union's *threat* to picket, delivered to a neutral employer, runs afoul of the Act. Specifically, in common-situs situations – or whenever a union has reason to believe that more than just the primary employer will be present at the location in question – the union has an "affirmative obligation to qualify its threat by clearly indicating that the [threatened protest] would conform to *Moore Dry Dock* standards," or would otherwise comply with Board law.[20] As demonstrated below,

---

[19] *See Elec. Workers Local 501 v. NLRB (Pond)*, 756 F.2d 888, 893-94 (D.C. Cir. 1985); *Egan*, 2005 WL 3662599, *4 ("Although failure to comply with one or more of the *Moore Dry Dock* standards does not constitute a per se violation of the Act, it creates a strong but rebuttable presumption that the picketing had an unlawful secondary object.").

[20] *Elec. Workers Local 98 (State Elec.)*, 342 NLRB No. 74, 2004 WL 1400257, *16-17 (2004) (unlawful threats to picket construction sites where primary non-union employer awarded subcontracts and when union knew other contractors would also be on project or threatened to target neutral owner of site); *see also Egan*, 2005 WL 3662599, *19 (no unlawful threat when union made clear that any picketing would target primary); *Iron Workers Local 433 (United Steel)*, 280 NLRB 1325, 1325 n.1, 1331-32 (1986) (unlawful threat to picket construction site where steel-erection subcontract awarded to primary, non-union employer and when union had no basis to assume other subcontractors would not also be on site),

the Union's letter to Beall's lacked the requisite assurances to the neutral employer and thus crossed from an innocuous warning of lawful primary picketing into an unlawful threat of secondary protests.

B. The Board Reasonably Found that the Union Unlawfully Threatened Beall's with Secondary Picketing

The circumstances and content of the Union's letter to Beall's amply support the Board's finding here of a secondary-threat violation. When it wrote to Beall's, the Union's primary dispute was with Energy Air, a non-union contractor. (A 104-05) Any dispute the Union had with Beall's was secondary, based on the fact that Energy Air was performing work on certain construction sites for Beall's stores. Moreover, the Union had reason to believe that other contractors would be present at the jobsites in question because, as the Union's letter states, Energy Air was assigned but a small portion (HVAC) of the overall construction jobs. Nonetheless, the Union plainly threatened in its letter to Beall's, a neutral, to publicize its primary dispute with Energy Air by picketing at the common Beall's jobsites. (A 406.) Given that the letter contained no assurances that the threatened picketing would conform to *Moore Dry Dock* or other Board law, the Board reasonably found that the Union violated Section 8(b)(4)(ii)(B) of the Act.

---

enf. denied, 850 F.2d 551 (9th Cir. 1988). *Accord Iron Workers Local 118 (Tutor-Saliba Corp.)*, 285 NLRB 162, 166 (1987).

C. The Board's Secondary-Threat Finding Is Based on a Reasonable Interpretation of Section 8(b)(4)(ii)(B)

Contrary to the Union's assertion (Br 24), neither the Board's secondary-threat finding nor its underlying analysis erroneously places the burden on unions to establish a reserved-gate system (separating a primary's entrance to a jobsite from that of neutrals) before picketing at multi-employer job sites. No party is ever required to establish a reserved gate, although a neutral employer wanting to insulate itself from the effects of labor disputes at a shared jobsite may *choose* to do so.[21] If a neutral does set up a reserved gate, however, the Board and the courts will presume that a union picketing at a neutral gate has a prohibited secondary motive, while a union confining its protests to a reserved gate does not. In other words, by picketing at a neutral gate, a union fails to satisfy the *Moore Dry Dock* reasonable-proximity factor.[22]

For the purpose of distinguishing primary and secondary picketing, therefore, reserved gates are merely an evidentiary tool for analyzing whether a union has appropriately focused its protest or, in this case, threat. Thus, reserved gates are not a *sine qua non* for establishing unlawful secondary picketing at a

---

[21] *Elec. Workers Local 761 v. NLRB*, 366 U.S. 667, 680-81 (1961) (noting further requirements not relevant here); *see also Egan*, 2005 WL 3662599, *4.

[22] *Pond*, 756 F.2d at 893-94; *Egan*, 2005 WL 3662599, *4 ("[P]icketing at a neutral gate violates *Moore Dry Dock* and therefore gives rise to a presumption that the union is pursuing an unlawful secondary objective.").

common situs, as the Union suggests (Br 25 n.2). In the absence of a reserved gate, a union does not, contrary to the Union's argument (Br 31), have license to picket a multi-employer job site indiscriminately. The Union is patently incorrect in suggesting (Br 17, 28) that this Court held otherwise in *J.F. Hoff Electric Co. v. NLRB*.[23] Rather, as the analysis in that case illustrates, a union retains its obligation, at a common situs without a reserved-gate system, to target the primary employer as exclusively as possible.[24] Under *Moore Dry Dock*, the union might accomplish that by confining its picketing to times when the primary is working at the common jobsite and clarifying the nature and target of its labor dispute on its picket signs. In this case, however, nothing in the Union's letter to Beall's indicated that the Union had any intent of targeting Energy Air.

The Union errs in asserting (Br 28-30) that it need not conform its common-situs picketing threat to *Moore Dry Dock* where, as here, the neutral never affirmatively informed it of any plan to establish a reserved gate. The existence or

---

[23] 642 F.2d 1266, 1271 (D.C. Cir. 1980) (explaining that, "so long as the *Moore Dry Dock*[] limitations are met," a union can picket at a common situs in a manner reaching the primary and the primary's suppliers and customers; neutrals can insulate themselves entirely from such lawful picketing only by faithfully observing a reserved-gate system).

[24] *Hoff*, 642 F.2d at 1271, 1276-77 (using *Moore Dry Dock* factors to analyze lawfulness of "situs picketing" along jobsite fence; picketing occurred both when effective reserved-gate system was in place and when system was tainted). *See generally Moore Dry Dock*, 92 NLRB at 549 (explaining factors relevant to determining whether common-situs picketing is lawful).

lack of a reserved gate at a common situs is apparent to the casual observer.[25] It certainly is not analogous to the sort of invisible, non-intuitive business information that this Court, in *J.F. Hoff* and *United Scenic Artists Local 829 v. NLRB*,[26] found the Board could not hold a union responsible for knowing. Beall's failure here to discuss its intentions regarding reserved gates with the Union is nothing like the failure of the employers in those cases to disclose information to the unions concerning technical ownership of supplies entering through a neutral gate and contractual control of disputed work assignments.[27] The Union's reliance (Br 28-30) on *J.F. Hoff* and *United Scenic Artists* is therefore misplaced.

In the instant case, the Union directed its letter threatening to picket a common situs to the neutral, not the primary employer. Moreover, the Union did nothing in its letter to reassure the neutral that the picketing would target the primary rather than the entire jobsite. By implying (Br 24-25) that Beall's was required to ask the Union to clarify the blanket threat in the letter, the Union erroneously attempts to shift the burden to the threatened neutral to verify that it will not be a target of the picketing. That burden rested with the Union, but the

---

[25] Reserved and neutral gates are typically created by placement of signs stating who can or cannot enter at each gate into a common situs. *See, e.g.*, *Pond*, 756 F.2d at 890 n.1; *Egan*, 2005 WL 3662599, *2.

[26] *United Scenic Artists*, 762 F.2d 1027 (D.C. Cir. 1985); *Hoff*, 642 F.2d 1266.

[27] *See United Scenic Artists*, 762 F.2d at 1030-32; *Hoff*, 642 F.2d at 1274-75.

Union failed to satisfy it. Under those circumstances, the Board (A 438) reasonably found that the Union violated the Act by issuing a broad picketing threat to Beall's, a neutral owner of a common jobsite, and making no attempt whatsoever – either by referencing the *Moore Dry Dock* factors or otherwise – to assure Beall's that the threatened picketing would focus on Energy Air, to the extent possible.

The same basic principles explicated above disprove the Union's assertions (Br 26-27, 31-32) that requiring unions to qualify picketing threats in common-situs situations is tantamount either to punishing unions for merely announcing in advance their intention to picket lawfully or to assuming that a threatening union will picket unlawfully. Under Section 8(b)(4)(ii)(B) of the Act, a union may not lawfully picket at a neutral's place of business in order to coerce the neutral into ceasing business dealings with a primary. And both the Supreme Court and this Court have recognized that the Board is constrained to interpret the Act's protection of a union's right to pressure primary employers in a way that shields neutral employers from that pressure to the extent possible.[28]

---

[28] *See NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951) (analyzing earlier iteration of Section 8(b)(4), the Court cites "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 pressures in controversies not their own."); *accord Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252, 1260 (D.C. Cir. 1980).

In the context of the existing legal landscape, the Board can reasonably find that a general threat, directed at a neutral, to picket the neutral's construction jobsite in the event the primary works on the job is a threat to commit an unfair labor practice. But a qualifying phrase, assuring the neutral that the union will focus its picketing on the primary (for example, by conforming to *Moore Dry Dock*), transforms that threat into advance notice of lawful conduct. By requiring such a qualifier, the Board reasonably exercised its discretion in a manner consistent with the Act.

In sum, whether or not Beall's ever established a reserved gate, the Board reasonably held that the onus was on the Union to notify Beall's of its intended picketing in a manner that effectively confined the impact of the threat as closely as possible to the primary. That burden corresponds to the Union's responsibility to confine the effects of any eventual picketing as much as practicable to the targeted primary. Because the Union failed to limit the picketing threat contained

---

See also Moore Dry Dock, 92 NLRB at 549 ("When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights."). Incidentally, the fact that a union's right to engage in primary picketing at a common situs is not absolute also undermines the Union's challenge to the judge's *Johnnie's Poultry* analogy (A 433), though this Court need not accept that analogy to find the Board's unqualified-threat rule reasonable.

in its letter to Beall's, the Board reasonably found a secondary threat in violation of Section 8(b)(4)(ii)(B) of the Act.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION, BY CONDUCTING A MOCK FUNERAL, VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT

A A Union Violates the Act if It Pickets a Neutral Business To Force that Business To Cease Doing Business with Another

Section 8(b)(4)(ii)(B) of the Act makes it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce" for the purpose of "forcing or requiring any person . . . to cease doing business with any other person."[29] As this Court has explained, a violation of that section comprises two required elements: (1) the union must undertake the challenged conduct with the intent of forcing or requiring a neutral business to cease doing business with another business; and (2) the challenged conduct must threaten, coerce, or restrain the neutral business.[30] With respect to intent, the Board and the courts have made clear that the unlawful secondary object need only be *one* of the motivations underlying a union's challenged conduct – it need not be the union's *sole*

---

[29] 29 U.S.C. § 158(b)(4)(ii)(B).

[30] *Soft Drink Workers*, 657 F.2d at 1261. *See also Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259, 1263 (11th Cir. 2005).

objective.[31] Regarding conduct, they have held that picketing, broadly defined, satisfies the statutory element of coercion.[32] Indeed, in reviewing the legislative history of Section 8(b)(4)(ii)(B), the Supreme Court found that "among the concerns of the proponents of the provision barring threats, coercion, or restraints aimed at secondary employers was consumer boycotts of neutral employers carried out by picketing."[33]

B. The Union's "Funeral" Constituted Unlawful Picketing for a Secondary Purpose – To Force the Hospital To Cease Doing Business with Massey and WTS

The Board reasonably found (A 437-38) that the Union's mock funeral was motivated at least in part by a prohibited secondary object. Indeed, establishing the intent element of the secondary picketing violation in this case is straightforward in light of the Union's admitted motivations for staging the mock funeral. Specifically, Michael Jeske, the Union's Business Manager and Secretary-

---

[31] *Longshoremen v. Allied Int'l, Inc.*, 456 U.S. 212, 224 n.21 (1982) (quoting *Denver Bldg. & Constr.*, 341 U.S. at 689); *Mine Workers District 29 v. NLRB*, 977 F.2d 1470, 1471 (D.C. Cir. 1992); *Egan*, 2005 WL 3662599, *3.

[32] *See Mine Workers District 29*, 977 F.2d at 1471 ("picketing constitutes unlawful secondary boycott activity in violation of § 8(b)(4)(ii)(B)" if motivated by a prohibited secondary object); *Egan*, 2005 WL 3662599, *3 (using term "picketing" interchangeably with coercion language of Section 8(b)(4)(ii)(B)).

[33] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 584 (1988) (citing 105 Cong.Rec. 15673, 2 Leg.Hist. 1615).

Treasurer, testified that the Union staged the funeral to persuade customers not to do business with the Hospital because the Union objected to the Hospital's use of non-union sheet-metal contractors and wanted the Hospital to use unionized contractors for future construction jobs.[34] (A 436; 159-60.) As Jeske further admitted, the Union had no independent labor dispute with the Hospital unrelated to the Hospital's use of those contractors. (A 160, 185, 188.) In other words, the Union intended the funeral to pressure the Hospital, a neutral entity, to stop doing business with certain non-union contractors. The Board and the courts have long found that such a motive constitutes a prohibited secondary object under the Act.[35]

The Union pursued its secondary objective by performing a two-hour mock funeral, during which a group of union members patrolled back and forth on the sidewalk in front of the Hospital's most frequented entrance. Despite the fact that none of the participating union members actually carried picket signs, the Board

---

[34] Jeske explained that the Union chose to focus the demonstration on malpractice because it believed that the same "corporate greed" on the part of the Hospital led both to the choice of non-union contractors and to substandard patient care. (A 159-60.)

[35] *See, e.g., Denver Bldg. & Constr.*, 341 U.S. 675, 687-88 (union picketed construction job to force neutral general contractor into removing non-union subcontractor from job); *Soft Drink Workers*, 657 F.2d at 1261-63 (union sought, through consumer boycott, to pressure neutral store into ceasing business dealings with non-local suppliers); *Service Employees Local 254*, 324 NLRB 743, 743 (1997) (union's admitted purpose was to force neutral hospital to cease doing business with non-union primary employer).

reasonably found (A 431-32), consistent with its precedent,[36] that the funeral procession constituted picketing because it established a symbolic barrier to entry into a neutral business.[37] By drawing such a not-to-be-breached line across the Hospital's entryway, and thus introducing a factor of quasi-physical intimidation to its protest that went beyond "mere persuasion" of potential patrons to boycott the Hospital, the Union restrained or coerced the Hospital within the meaning of Section 8(b)(4)(ii)(B).

C. The Board's Decision Conforms to Supreme Court Precedent

Contrary to the Union's assertions, the Board's decision in this case is entirely consistent with relevant Supreme Court law. In *Edward J. DeBartolo*

---

[36] *See, e.g., Svc. Employees Local 254*, 324 NLRB at 749 ("Picketing has been defined as conduct which may induce action of one kind or another irrespective of the nature of the ideas which are being disseminated.") (quotation omitted); *Teamsters Local 917 (Industry City Assocs.)*, 307 NLRB 1419, 1419 n.3 (1992) (finding picketing where union representatives patrolled wearing poster-size placards, even if message on placards might be protected in the absence of patrolling); *Chicago Typographical Union No. 16 (Alden Press)*, 151 NLRB 1666, 1669 (1965) (contrasting "general parading," which even the businesses in the area did not perceive as picketing, with picketing-type patrolling that "confronts" customers by targeting a particular establishment in an effort to dissuade customers from patronizing it).

[37] Citing the instant case, the Board in *Laborers Eastern Region Organizing Fund (The Ranches at Mt. Sinai)*, 346 NLRB No. 105 (2006), 2006 WL 1196457, *3-4, again found that patrolling by a few union representatives – similar to the funeral patrolling in this case – amounted to picketing in violation of Section 8(b)(4). The analysis in *Mt. Sinai* emphasized the representatives' "back and forth movements" across jobsite entrances which, the Board found, "effectively formed a barrier" to entrance and were therefore akin to picketing.

Corp. v. Florida Gulf Coast Building Trades Council, the Supreme Court, construing the Act's secondary-boycott provision to avoid possible first-amendment issues, found that Section 8(b)(4)(ii)(B) does not prohibit a union from engaging in "mere persuasion" by peacefully distributing handbills calling for a secondary consumer boycott.[38] In reaching that conclusion, the Court emphasized repeatedly that the handbilling at issue in *DeBartolo* was *not* – unlike the Union's ambulatory mock funeral in this case – accompanied by any picketing or patrolling.[39] The *DeBartolo* Court further explained, quoting *NLRB v. Retail Store Employees (Safeco)*,[40] that picketing is "a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment."[41]

In his concurring opinion in *Safeco*, Justice Stevens specifically cited "patrol of a particular locality" as one of the "aspects of picketing [that] make it the

---

[38] 485 U.S. 568, 575-85 (1988). Contrary to the Union's assertion (Br 35), the *DeBartolo* court did not find that the Board's construction of the Act as prohibiting handbilling would violate the First Amendment, but only that a narrower construction of the Act was possible and would "make[] unnecessary passing on the serious constitutional questions that would be raised by the Board's understanding of the statute." *Id.* at 588.

[39] *Id.*

[40] 447 U.S. 607 (1980).

[41] *DeBartolo*, 485 U.S. at 580 (quoting *Safeco*, 447 U.S. at 619 (Stevens, J., concurring)).

subject of restrictive regulation.[42] Here, as described above, the Board found that the element of the mock funeral that elevated the demonstration to the level of picketing and triggered the Board's unfair-labor-practice finding was the union members' *conduct* in patrolling, which created a symbolic barrier in front of the Hospital. The Board did not rely on the Union's leaflets, its message about the Hospital's alleged malpractice, or on the fact that the Union reenacted a "funeral," complete with grim reaper. (A 431-32.) Nor did the Board rely, as the Union asserts (Br 38-39), on the prohibited-objective rationale in the judge's analysis of the dismissed rat-balloon allegation (A 436).

In light of the Board's reliance on the Union's patrolling conduct during the mock funeral, its decision is entirely consistent with *DeBartolo* and *Safeco*, and the Union has not identified any Supreme Court case overruling those decisions. Indeed, the Eleventh Circuit, in an injunction proceeding regarding the very same Board proceeding that underlies this case, rejected the Union's constitutional defense, persuasively outlining why a finding that the Union's mock funeral constituted a violation of the Act's secondary-picketing provision would be consistent with controlling Supreme Court precedent.[43]

---

[42] 447 U.S. at 619 (quotation omitted).

[43] *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259, 1264-65 (11th Cir. 2005).

A more general response to the Union's and the amicus' broad constitutional challenge is that, as the Supreme Court recognized in *NAACP v. Claiborne Hardware Co.*, the government has a "strong . . . interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."[44] The Court cited, as an example, the fact that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'"[45] *Claiborne* involved, among other tactics, peaceful picketing of businesses as part of a campaign to influence governmental policies regarding civil rights and integration, which the Court distinguished from "a boycott organized for economic ends," and the Court explained that the "broad power to regulate economic activity" that underlies the Act, among other statutes, is not matched by a "comparable right to prohibit peaceful political activity."[46] By recognizing the government's general power to regulate economic activity and its special interest in regulating labor disputes to

---

44 458 U.S. 886, 912 (1982).

45 *Id.* (quoting *Safeco*, 447 U.S. at 617-18) (Blackmun, J, concurring in part)). *See also Longshoremen ILA v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) ("The labor laws reflect a careful balancing of interests").

46 *Id.* at 913-15.

protect neutrals, the Court's analysis in *Claiborne* undermines much of the "slippery-slope" rationale underpinning the Union's challenge to its mock-funeral 8(b)(4)(ii)(B) violation. That analysis demonstrates that the Supreme Court has long viewed the First Amendment's constraints on government power in a manner consistent with the Board's interpretation of the secondary-picketing provision of the Act and, along with *DeBartolo* and *Safeco*, validates the Board's finding of a secondary-picketing violation here, based on the Union's coercive patrolling conduct.

III. THE BOARD REASONABLY FOUND THAT THE UNION VIOLATED SECTION 8(g) OF THE ACT BY FAILING TO GIVE THE HOSPITAL ADVANCE NOTICE OF THE MOCK FUNERAL

Under Section 8(g) of the Act, a labor organization must provide a healthcare institution with a written notice at least 10 days before "engaging in any strike, picketing, or other concerted refusal to work at" the institution.[47] Initially, the Board read that provision "literally" to bar any union from conducting any picketing on the grounds of a healthcare organization, for any reason, without strict 8(g)-compliant notice.[48] In *Painters Local 452 (Henry C. Beck Co.)*, however, the

---

47 29 U.S.C. § 158(g).

48 *National Union of Hosp. & Healthcare Employees District 1199 (Parkway Pavillion)*, 222 NLRB 212, 212-13 (1976) (noting that "Section 8(g) is devoid of any modifying language respecting the character of the picketing, its objectives, or the type of economic pressures generated," and holding union violated 8(g) by

Board refined its interpretation of the notice provision, rejecting the proposition that a picketing union is subject to 8(g) notice requirements "simply because the [protest] is to take place at the premises of a neutral health care institution."[49] Instead, the Board held, in agreement with this Court, that 8(g) applies only to picketing "directed against" a healthcare facility.[50]

Since *Beck*, the Board has applied the 8(g) notice requirement to unions that do not represent or seek to represent healthcare workers where, as here, their picketing, although nominally directed at a non-healthcare primary employer, has in fact targeted a neutral healthcare facility. In *Bricklayers & Allied Craftsmen (Lake Shore Hosp.)*, for example, the Board applied 8(g) to a union that picketed against a hospital with signs protesting the hospital's hiring of non-union contractors on a construction project.[51] Despite the fact that the protest was ostensibly framed as an appeal to the public, and not intended to disrupt hospital

---

joining 8(g)-compliant picket line to express sympathy with picketing union without giving hospital separate 8(g) notice), *enf. denied*, 556 F.2d 558 (2d Cir. 1976).

[49] 246 NLRB 970, 973 (1979).

[50] *Id.* at 972-73 (citing *Laborers Local 1057 v. NLRB (Mercy Hosp. of Laredo)*, 567 F.2d 1006 (D.C. Cir. 1977)).

[51] 252 NLRB 252, 253 (1980). *See also Sheet Metal Workers Local 324 (Lake Shore Hosp.)*, 254 NLRB 536 (1981) (reaching same conclusion regarding very similar facts).

operations, the Board found that "picketing, directed at [the hospital] although disavowing any appeal to [h]ospital employees, had a potential to disrupt health care services."[52]

Like the Bricklayers protest in *Lake Shore*, the Union's mock-funeral was directed against the Hospital. While the Union may nominally have appealed to the public, it did not confine its protest to locations where Massey and WTS construction workers were entering or working on the jobsite. To the contrary, the Union focused its activity on the entrance to the adjacent operational healthcare facility. Moreover, nothing about the Union's protest, including the handbills, made any attempt to clarify for the observer that the Union's dispute was not with the Hospital.[53]

The Union's failure to target the construction site where Massey and WTS were working – rather than the public entrance to the Hospital – contrasts with the conduct of the union in *Beck*, which did not have to provide 8(g) notice. Unlike the Union here, the union in *Beck* confined its protests to reserved entrances into the disputed construction site and did not approach adjacent operational healthcare

---

[52] *Id.* at 253-54.

[53] *Compare Laborers Local 1253 (St. Mary's Hosp.)*, 248 NLRB 244 (1980) (finding 8(g) did not apply to union's picketing in front of hospital when picket signs made clear that union was engaged in economic dispute with non-union contractor and not dispute with hospital).

facilities.[54] However, the Hospital's failure to establish a reserved-gate system here did not free the Union from its obligation to focus its picketing on the primary to the extent possible. Even without a reserved gate, the Union could have targeted Massey and WTS at an entrance to the construction site, which was closer to their worksite and further from the Hospital's working entrances. Instead, the Union's deliberate targeting of the main hospital entrance, away from the construction site, demonstrates that the funeral was "directed at" the Hospital. The Union's picketing here was thus properly subject to 8(g) notice requirements.

Finally, the Union's constitutional argument (Br 53) regarding 8(g) is specious. The government clearly has a strong interest in protecting the continuity of healthcare, which is sufficient to sustain a provision requiring unions merely to notify healthcare institutions before conducting picketing that could potentially disrupt healthcare. That is particularly true given that, as discussed above (*see* pages 25-26), the Supreme Court has recognized that labor picketing involves conduct that is subject to government regulation.

In sum, despite the fact that the ultimate targets of the Union's protest were Massey and WTS, the Union set its picketing up outside the Hospital's main public entrance, creating a symbolic barrier to entry into that healthcare institution that could have affected patients and healthcare workers alike. During that picketing,

---

[54] *Id.* at 971.

the Union handed out pamphlets criticizing the Hospital's healthcare practices. Under those circumstances, the Board reasonably found (A 430, 438), consistent with relevant precedent, that the Union's failure to provide the Hospital with any advance notice of the mock funeral violated Section 8(g) of the Act.

IV. THE BOARD APPROPRIATELY TAILORED ITS CEASE-AND-DESIST ORDER TO REMEDY THE UNION'S SECONDARY-PICKETING VIOLATION

After determining that the Union's mock funeral constituted unlawful secondary picketing in violation of Section 8(b)(4)(ii)(B) of the Act, the Board issued a cease-and-desist order barring the Union from picketing the Hospital with the object of forcing the Hospital to cease doing business with Massey and WTS. (A 431.) That sort of narrow cease-and-desist order, proscribing the respondent from re-committing the violation found against the same parties in the future, is a typical Board remedy.[55] Contrary to the Union's assertions (Br 55), the order is not "irresponsible," and the Union's parade-of-horribles argument is indeed "abstract."

As an initial matter, the Board narrowed the cease-and-desist order issued by the judge, which barred the Union from "[p]icketing [the Hospital] *or any other employer* with the object of forcing it to cease doing business with [Massey and

---

[55] *See, e.g.*, *Egan*, 2005 WL 3662599, *7 (specifying primary and neutral in cease-and-desist order); *Service Employees Local 254*, 324 NLRB 743, 743, 750 (1997) (specifying primary).

WTS] *or any other employer with whom the . . . Union may have a dispute*. (A 439.) (emphasis added) Citing the judge's failure to justify such a sweeping order (A 430 n.2), the Board confined its injunction to cases where the Union pickets the Hospital to pressure it to cease dealing with Massey and WTS, the precise violation found in this case.

The Union purports (Br 54-56) to feel hamstrung by uncertainty regarding the order's parameters because of *dicta* in the Board's opinion (A 431) that declines to foreclose the possibility that the Board could find restraint and coercion within the meaning of Section 8(b)(4)(ii)(B) in the absence of patrolling. The Union's concerns are, however, largely hypothetical, given that the Board has strictly confined its order to the parties involved in this case. There is no evidence that another confrontation between the Union and the Hospital regarding employment of Massey and WTS is likely. Presumably, the construction project underway in 2003-2004 – and certainly Massey's HVAC portion of the job – is nearly or totally completed by now.[56]

In sum, the Board's cease-and-desist order for the Union's secondary-picketing violation in this case is both consistent with the Board's regular practice

---

[56] In any event, it is of course within the Court's power to limit any order it would issue in this case as it deems appropriate. The Union's objections certainly do not warrant either the granting of its petition for review or a remand to the Board.

and appropriately tailored to remedy the violation at issue. Accordingly, the Board did not abuse its discretion by barring the Union from picketing the Hospital with the secondary object of ceasing the Hospital's business dealings with Massey and WTS.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Union's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

_____
JULIE B. BROIDO
Supervisory Attorney

_____
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2996
(202) 273-0656

RONALD E. MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
AILEEN A ARMSTRONG
Deputy Associate General Counsel
National Labor Relations Board
October 13, 2006
g:/acbcom/sheetmetal-final brief-jbkv