Sheet Metal Workers International Association, Local 15, AFL–CIO *and* Galencare, Inc., d/b/a Brandon Regional Medical Center *and* Energy Air, Inc. Cases 12–CC–1258, 12–CC–1270, 12–CG–13, and 12–CC–1268

January 9, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 7, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel and Charging Party Brandon filed answering briefs, and the Respondent filed a reply brief. Charging Party Energy Air filed exceptions and a supporting brief, to which the Respondent filed a brief in opposition. The General Counsel filed cross-exceptions and a supporting brief, to which the Respondent filed a brief in opposition.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified below.[2]

1. Respondent's September 26, 2003 letter to CVS

The Respondent had a labor dispute with Energy Air, a nonunion sheet metal contractor. Pursuant to this labor dispute, the Respondent sent a letter to CVS, a drug store with many locations in Florida. Although Energy Air was not presently working on any CVS construction projects, the Respondent's letter to CVS indicated that it understood that Energy Air "may be bidding" on future CVS projects and that there would be leafleting and protesting at the site if Energy Air worked on any CVS project. Attached to the letter was a newspaper article that is described below.

The judge found that, in its letter to CVS, the Respondent did not violate Section 8(b)(4)(ii)(B). The allegation was that the Respondent threatened to picket CVS and failed to provide assurances that such picketing at future CVS construction sites would comply with the standards set forth in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950). The judge rejected this allegation on the basis that the letter contained only a threat to leaflet and protest, not a threat to picket.

In their argument to the judge, and in their respective exceptions and cross-exceptions to the Board, Energy Air and the General Counsel contend that the letter should be read in context with an attached newspaper article. The appended article described the Respondent's protest demonstration at a CVS construction site 3 months earlier, which protest allegedly involved picketing. Thus, the General Counsel and Energy Air argue that the letter should be construed as containing a threat to picket that triggered the requirement of providing *Moore Dry Dock* assurances. Specifically, the General Counsel and Energy Air note that the newspaper article described the Respondent's display of a large inflatable rat during the earlier CVS construction site protest, and they argue that because the rat display is a method of picketing, the Respondent's letter containing the current threat to protest was actually a threat to picket any future CVS construction site where Energy Air may be employed as a subcontractor. We disagree.

The purpose of the Board's requirement that unions provide secondary employers with *Moore Dry Dock* assurances in connection with an announcement to picket a common situs is to assure the secondary that the picketing will be confined to the primary employer. *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 749–750, 752 (2004). Here, even assuming that the letter is to be read in context with the newspaper article, and assuming further, but without deciding, that the previous display of the rat constituted picketing, we agree with the judge that the newspaper article reported that the Respondent's activities at the previous CVS construction site appear to have been confined to the primary employer and, thus, would not have violated Section 8(b)(4)(ii)(B). We find, therefore, that the Respondent's letter and appended newspaper article indicated that whatever protest activity that it intended to undertake at a future CVS site would likewise be primary and in conformity with *Moore Dry Dock* standards.

2. Respondent's conduct at Brandon Regional Medical Center

We agree with the judge that the Respondent, in furtherance of its primary dispute with Massey Metals and WTS, engaged in picketing at the neutral secondary site of Brandon Regional Medical Center. For the reasons set forth by the judge, we agree that the Respondent violated Section 8(b)(4)(ii)(B) by holding a "mock funeral procession" at that site. That conduct constituted picketing.

[1] The Respondent subsequently supplemented its brief by directing to the Board's attention the decisions in *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005), cert. denied 126 S.Ct. 399 (2005), and *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005).

[2] The judge included a broad cease-and-desist provision in his recommended Order, but failed to set forth any rationale justifying the need for this remedy. We note that the General Counsel did not request a broad order and we find no warrant for one under the circumstances of this case. We therefore shall substitute a narrow cease-and-desist provision for that in the recommended Order, and conform the notice accordingly.

The procession, accompanied by leafleting, involved members of the Respondent patrolling on the public sidewalk in front of the Medical Center while carrying a faux casket and accompanied by a member dressed as the Grim Reaper.

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).

As to the leafleting that the Respondent concurrently undertook at the Medical Center, it is unclear whether the judge found this activity to be independently unlawful. The Respondent has filed exceptions to several statements in the judge's decision which arguably indicate that the leafleting itself was unlawful. Assuming that this is the judge's holding, we find merit in the Respondent's exceptions and reverse the judge on the bases that the complaint did not allege that the leafleting conducted during the mock funeral was unlawful, and because the General Counsel, in his answering brief, expressly disavows that the leafleting was unlawful.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sheet Metal Workers International Association, Local 15, AFL–CIO, Tampa, Florida, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Unqualifiedly threatening to picket with the object of forcing Beall's Inc., to cease doing business with Energy Air, Inc."

2. Substitute the following for paragraph 1(b).

"(b) Picketing Galencare, Inc., d/b/a Brandon Regional Medical Center, with the object of forcing it to cease doing business with Massey Metals, Inc., and Workers Temporary Staffing."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, concurring in part.

I join with my colleagues in finding that the Respondent violated Section 8(b)(4)(ii)(B) by engaging in a mock funeral procession at the Brandon Medical Center in support of a secondary objective. In finding the violation, I am guided by the principles set forth in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988), and *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005).

DeBartolo stands for the proposition that picketing or patrolling is different than handbilling and other forms of "mere persuasion." 485 U.S. at 580. The *DeBartolo* court embraced much of Justice Stevens' concurrence in *NLRB v. Retail Clerks Local 101 (Safeco),* 447 U.S. 607 (1980). In *Safeco*, Justice Stevens stated that 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." 447 U.S. at 619. As the Ninth Circuit Court of Appeals explained in *Overstreet*—a case involving a stationary banner—ambulatory picketing or patrolling classically involves more than the "mere persuasion" of a banner, it also involves the intimidation of a physical or symbolic barrier to the entrance way.

In the present case, the Respondent engaged in ambulatory patrolling activity in front of the Medical Center. It engaged in a procession in which four persons went back and forth on the public sidewalk in front of the hospital's main entrance. This conduct effectively created a symbolic barrier, a line in front of an entrance way not to be crossed, that is akin to picketing under the principles of *DeBartolo* and *Overstreet*. The gravamen of the violation is not that patrollers carried a faux casket and a costumed "grim reaper" figure carrying a large sickle, for these expressive displays offer "mere persuasion" and do not serve to erect a physical or symbolic barrier to the Medical Center's entrance. Rather, it is the patrolling itself that erected a barrier to entering the hospital.

Accordingly, I concur in finding that the Respondent violated Section 8(b)(4)(ii)(B).

[3] Because we have found that the Respondent violated Sec. 8(b)(4)(ii)(B) at the Medical Center and have issued an appropriate Order, we find it unnecessary to pass on the judge's findings that the Respondent additionally violated Sec.8(b)(4)(ii)(B) by displaying a large inflatable rat on public property near the front vehicle and doorway entrances to the Medical Center and by the conduct of Brandon Holly who the judge found held a leaflet in front of his chest as a placard. A finding of such a violation as to these matters would be cumulative and would not affect the Order.

In finding it unnecessary to decide whether the display of the inflatable rat was unlawful, Member Schaumber notes that the General Counsel alleges only that the display of the rat violated Sec. 8(b)(4)(ii)(B). The General Counsel does not allege that the display violated Sec. 8(b)(4)(i)(B).

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.

WE WILL NOT unqualifiedly threaten to picket with the object of forcing Beall's, Inc. to cease doing business with Energy Air, Inc.

WE WILL NOT, by picketing, threaten, coerce, or restrain Galencare, Inc., d/b/a Brandon Regional Medical Center, with the object of forcing Galencare, Inc., d/b/a Brandon Regional Medical Center, to cease doing business with Massey Metals, Inc., and Workers Temporary Staffing.

WE WILL NOT fail to give notice to Galencare, Inc., d/b/a Brandon Regional Medical Center, of our intention to engage in picketing at its facility located in Brandon, Florida.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 15, AFL–CIO

Chris C. Zerby, Esq., for the General Counsel.
Arlus J. Stephens and *Michael P. Anderson (on brief), Esqs.,* for the Respondent.
Tammie L. Rattray and *James G. Brown (on brief), Esqs*., for the Charging Party, Galencare.
Patrick M. Muldowney, Esq., for the Charging Party, Energy Air.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Tampa, Florida, on September 14, 2004, pursuant to a consolidated complaint that issued on July 29, 2004.[1] The complaint alleges that the Respondent Union unlawfully engaged in secondary activity against three separate employers in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act. One of the employers is a health care institution and the complaint alleges that the Union's activity at that institution on March 15, 2004, constituted picketing and violated Section 8(g) of the Act. The Respondent's answer denies all violations of the Act (the Act). I find that the Respondent did violate the Act substantially as alleged in the complaint.

[1] All dates are in 2003, unless otherwise indicated. The charge in Case 12–CC–1258 was filed on January 13, the charge in Case 12–CC–1268 was filed on October 21, and the charges in Cases 12–CC–1270 and 12–CG–13 were filed on March 18, 2004.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Sheet Metal Workers International Association, Local 15, AFL–CIO, the Union, admits, and I find and conclude, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Charging Party Galencare, Inc., d/b/a Brandon Regional Medical Center (the Hospital), is a Florida corporation engaged in the operation of a private acute care hospital in Brandon, Florida. The Hospital annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Florida. The Union admits, and I find and conclude, that the Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

The Charging Party Energy Air, Inc. (Energy Air), is a Florida corporation engaged in the business of sheet metal fabrication and installation. Energy Air annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Florida. The Union admits, and I find and conclude, that Energy Air is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Statute

This proceeding concerns four instances of alleged unlawful secondary activity. Two of the instances involve alleged threats in letters sent to Beall's, Inc. and CVS Pharmacy, respectively. The other two instances involve conduct at the Hospital. Section 8(b)(4)(ii)(B) of the Act, in pertinent part as applied to this case, provides that it shall be an unfair labor practice 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 . . . ."

B. An Evidentiary Issue

At the hearing, over objections, I admitted a newspaper report of comments attributed to the chief executive officer of the Hospital, Mike Fencel, to the effect that the Union's activities in January "helped our business." The General Counsel and Hospital point out that the effect of unlawful secondary activity is not relevant and do not address my admission of the document. The Respondent argues that the statement is an admission by a party-opponent and is not hearsay. Fed.R.Evid. 801(d)(2)(A). The newspaper article is admissible pursuant Fed.R.Evid 902(6); however, the only evidence before me is

[2] In its brief, the Respondent cites advice memoranda relating to rats and a billboard in which it was determined that a complaint should not be issued. As all parties are aware, decisions of administrative law judges are based upon applicable Board precedent, not advice memoranda.

that document, the report of the reporter. Although the statement is attributed to the CEO, the fact remains that the statement in the document is the statement of the reporter, attributing it to the CEO. The reporter is not a party, thus the reported statement is not an admission of a party, and it is hearsay. See *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991). In this case, as in *New England Mutual Life Ins. Co. v. Anderson*, 888 F.2d 646 (10th Cir. 1989), the "purported admissions in the article were recounted in statements of a third party reporter, who was unavailable for cross-examination, and the statements were offered to prove the truth of the matters asserted. The fact that the statement was in the form of a newspaper account reinforces its hearsay character . . . and it was not demonstrated that the statements as reported were accurate." Id. at 650. In view of the foregoing, I shall not rely upon the purported statement of the CEO. I shall leave the document, Respondent's Exhibit 10, in the record to assure that the record is complete.

C. The Alleged Unlawful Threats to Beall's, Inc., and CVS Pharmacy

1. Facts

The Union is involved in a labor dispute with Energy Air. Beall's, Inc. operates a chain of retail department stores in Florida. On September 26, 2003, Samuel A. McIntosh, organizer with the Union, sent to Steven M. Knopik, president of Beall's, Inc. a letter stating the following:

> Our organization has an ongoing labor dispute with Energy Air, Inc. This contractor has been charged with serious Federal Law Violations and is currently being investigated by the Federal Government.
>
> We understand that Energy Air is performing HVAC mechanical work on the Beall's Department Store construction projects in Oldsmar and Ormond Beach, Florida.
>
> 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.
>
> If you have any question I can be contacted at (813) 628-0021.

CVS operates a chain of pharmacies throughout the United States including locations in Florida. On September 26, 2003, organizer McIntosh, sent to Mark Chiarletti, project manager of CVS Pharmacy, Inc., a letter similar to that sent to Beall's, Inc. The first and last paragraphs were identical to those paragraphs in the letter sent to Beall's, Inc. The second and third paragraphs state:

> We understand that Energy Air may be bidding to perform HVAC mechanical work on CVS Pharmacy construction projects throughout Florida.
>
> In the event Energy Air commences operation on any CVS Pharmacy construction project, the union will be compelled to publicize our dispute with Energy Air by the way of leafleting and protesting at the site.

Accompanying the letter to CVS was a newspaper article downloaded from the Internet that described a demonstration at a CVS construction site involving Organizer McIntosh, three union members, and a large inflatable rat. The article reports that the protest was against the nonunion sheet metal contractor on the site and that the protesters made clear that the Union's protest was against the sheet metal contractor on the site "not . . . the pharmacy."

2. Analysis and concluding findings

The complaint alleges that the foregoing letters contained unlawful threats in violation of Section 8(b)(4)(ii)(B) of the Act. The Respondent's answer denies the allegations and asserts that the Union does have a labor dispute with Beall's and CVS over their use of nonunion contractors. The Union's dispute with Beall's and CVS does not relate to the wages, hours, and working conditions of employees represented by the Union. It relates to the entrepreneurial decisions of Beall's and CVS.

Board precedent establishes that an unqualified threat to engage in secondary picketing, without qualifying the threat, violates the Act. "Thus where a union makes an unqualified threat to a neutral general contractor to picket a jobsite where an offending primary employer would be working, and has reason to believe that persons other than the primary would be at work on the site, it has an affirmative obligation to qualify its threat by clearly indicating that the picketing would conform to *Moore Dry Dock* [92 NLRB 547 (1950)] standards or otherwise be in uniformity with Board law." *Teamsters Local 456 (Peckham Materials)*, 307 NLRB 612, 619 (1992) [citations omitted]. I note that this assurance that a union will not act contrary to the law is similar in character to the assurance against reprisals that an employer must give pursuant to *Johnnie's Poultry Co*., 146 NLRB 770 (1964), prior to interviewing an employee in preparation for an unfair labor practice proceeding.

The Respondent cites the decision of the Court of Appeals for the Ninth Circuit in *Journeymen Local 32 v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990), in which the court of appeals denied enforcement of a Board order and stated that the "Board could not presume that a union's unqualified threat to picket the job was a threat to picket contrary to the law . . . ." The Board accepted the foregoing decision only as law of the case. *Plumbers Local 32 (Ramada, Inc.*), 302 NLRB 919 (1991). The Board continues to require a union to indicate that its picketing will conform to *Moore Dry Dock* standards and recently affirmed the decision of an administrative law judge that restated the foregoing principle. *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 483, 495 (2004).

The letter to Beall's threatened picketing. The uncertainly conveyed by referring to the "possibility of picketing" does not diminish the threat. Insofar as the letter specified HVAC mechanical work, the Respondent was aware that other subcontractors would be on the jobsite. The threat was unaccompanied by the qualification that the Union would conform to *Moore Dry Dock* standards. I find that the Respondent's unqualified threat to picket Beall's construction projects in Oldsmar and Ormond Beach, Florida, violated Section 8(b)(4)(ii)(B) of the Act.

The Respondent's letters to Beall's and CVS also referred to leafleting and protesting but do not set out the nature of the protests. The newspaper article attached to the letter to CVS, which notes that the Union made it clear that the protest was against the contractor and "not . . . the pharmacy," does not establish that the Union's activities were secondary rather primary. Upon remand from the Ninth Circuit in *Plumbers Local 32 (Ramada, Inc.)*, supra, the Board considered the union's additional threats to handbill and organize a boycott, issues that it had not addressed in view of its finding that the threat to picket violated the Act. The Board held that, under *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988), *DeBartolo II*, a union's attempt to persuade customers not to patronize neutral employers "in the absence of violence, picketing, and patrolling" was not coercive and did not violate the Act. *Plumbers Local 32 (Ramada, Inc.*), supra at 920.

I shall recommend that the allegations relating to leafleting and protests, the nature of which were not specified, at Beall's jobsites be dismissed. There was no threat to picket CVS. I shall recommend that all allegations relating to CVS be dismissed.

D. The Allegations Involving the Hospital

1. Facts

a. The entities involved

The Union has an ongoing labor dispute with Massey Metals, Inc., a nonunion sheet metal contractor. In January and February 2003 and March 2004 Massey Metals was engaged in the construction of additional hospital facilities that were located south of and behind the existing hospital building in Brandon, Florida. Although the Respondent's answer does not admit that Massey was performing work on March 15, 2004, the testimony of Esco O'Neal, supervisor for Massey Metals, establishes that it was. O'Neal testified that Massey is performing work at the site for general contractor J. J. Kirlin. Workers Temporary Staffing, WTS, is a temporary employment agency providing employees to various employers including Massey Metals, which augments its workforce with employees provided by WTS.

b. The location

In 2003, the main entrance to the Hospital faced north, toward Oakfield Drive. The construction site was not visible from the front of the Hospital because the existing hospital building blocked the view. The Oakfield right-of-way includes a sidewalk and grassy area separated from the property of the Hospital by a low, 3-foot-high hedge. Immediately inside the hedge is a parking lot. Access to the parking lot and hospital entrance is obtained by driving onto the hospital property on a semicircular driveway or walking to the entrance upon sidewalks that parallel the driveway. The east driveway entrance, referred to as the main entrance, intersects with Oakfield in a "T," i.e., access is only from Oakfield. The west driveway is at the intersection of Oakfield and South Moon Avenue. It is referred to as the Moon entrance, and it is effectively an extension or continuation of South Moon Avenue. All of the Union's activity occurred on the Oakfield right-of way, and no citations were issued for trespassing.

In 2003, construction employees entered the construction site from an entrance on Vonderberg Drive, a street that runs perpendicular to Oakfield Drive on the west side of the property of the Hospital.

c. January 2003

On May 9, 2002, prior to the commencement of the expansion project, the Union had written the Hospital and stated its intention "to establish a massive picket line" if the Hospital used various named nonunion contractors on the project. Included in the list was Massey Metals. On January 9, organizer McIntosh and six members of the Union went to the Oakfield Drive right-of-way directly in front of the Hospital. They inflated a rat balloon that is 12-feet wide at the base and 16-feet high. The balloon has what appears to be a cigar in the mouth of the rat. Six metal rings have been stitched onto the rat's abdomen. The Union uses the rings to attach banners to the rat's abdomen. The Union placed the rat on a flatbed trailer between the entrances to the semicircular driveway, approximately 145 feet west of the main entrance and 170 feet east of the Moon entrance. This location was approximately 100 feet away from, but directly in front of, the doors through which people entered and exited the Hospital. Attached to the metal rings on the rat's abdomen was a banner that read "Workers Temporary Staffing."

After the rat was inflated, the union members began distributing leaflets. The leaflets were 8-1/2 by 11-inch sheets of paper bearing the caption, "There's a 'Rat' at Brandon Regional Hospital." Immediately beneath the caption is a cartoon depicting a hospital room in which a patient lying in a bed is being attended by a nurse who is looking in an alarmed manner at a rat in the patient's room. The rat caricature is sitting on the floor picking its teeth and a custodian with a broom and dustpan is depicted as being on one knee behind the rat. The rat, bearing the letters WTS on its abdomen, is larger than the custodian. Union Business Manager Michael Jeske testified that to him it appeared that the custodian was sweeping up cheese crumbs. I suggest, given the fact that the custodian is behind rather that in front of the rat, that cleaning up rat droppings rather than cheese crumbs is the message conveyed. Beneath the cartoon is the following text:

> Workers Temporary Staffing (WTS) is a temporary employment agency that employs workers on the construction site of the South Tower expansion project of Brandon Regional Hospital.
>
> We consider a "rat employer" to be one that undermines the wages, benefits and other working condition established by our local labor agreement or otherwise violates workers' rights.
>
> We consider Workers Temporary Staffing to be such an employer. In fact, Workers Temporary Staffing is currently being investigated by the Federal Government for possible labor law violations.

> It's just a matter of common sense. If the action of companies like Workers Temporary Staffing are tolerated, it will undermine the living standard of our entire community

The Union's name does not appear anywhere on the leaflet. Assuming that the Union intended to refer to itself when using the word "we," that reference fails because the entity to which the word "we" refers is not stated. The reference to "our local labor agreement" is totally meaningless in the foregoing context.

One of the union members engaging in leafleting was Brendon Holly. Holly was photographed at the hospital entrance at the intersection of Oakfield and South Moon Avenue, the Moon entrance, holding a leaflet with both hands in front of his chest at the eye level of drivers in passing vehicles. Organizer McIntosh acknowledged that Holly did this for 2 days, the first day, January 9, and on one other occasion. "He was only out there I believe for only two days and once . . . the charges were filed, we instructed him not to hold up the handbills like that. . . . On the second day, I advised him to stop doing it." The initial charge was filed by the Hospital on January 13. Despite instructions to hold the handbills "by his side and pass them out," McIntosh admitted that Holly "decided to do it his own way."

Dodd Day, the Hospital's former safety and security manager, testified that the Workers Temporary Staffing sign affixed to the rat was printed in letters 12 inches high and was "prominent enough" to be seen by passing vehicles. Dodd spoke with McIntosh regarding what was occurring. McIntosh gave Dodd a handbill and stated that "he was there picketing because one of our subcontractors was not union or he had some kind of union problem with the sheet metal subcontractor."

McIntosh acknowledged that the Union was not seeking to represent nurses and that the dispute with the Hospital related to its use of nonunion contractors. He testified that the Union was "targeting the community, patients in the area" rather than WTS. He explained that the Union felt that the rat balloon "would probably get the attention of the public more than just regular handbills." Business Manager Michael Jeske acknowledged that "among construction workers, rat is known as being a nonunion contractor."

The Hospital filed an unfair labor practice charge against the Union on January 13. Soon thereafter, the Union added a disclaimer in smaller typeface at the bottom of the leaflet stating:

> This Flyer does not intend, nor does it ask any employee to cease work or cease deliveries, nor does it ask anyone to take any action against Workers Temporary Staffing or Brandon Regional Hospital.

The Hospital established a reserved gate on January 16, several hundred feet west of the Moon entrance, off of Vonderberg Drive. The Union continued to inflate the rat and leaflet on the Oakfield right-of-way intermittently until February 20.

The charge filed by the Hospital against the Union was settled. The terms of the settlement agreement do not appear in the record. Insofar as there was no inflation of the rat or leafleting after February 20, it would appear that the Union agreed to cease those activities. The settlement agreement was set aside by the Regional Director on July 15, 2004, following the Union's actions on March 15, 2004.

d. March 15, 2004

On March 15, 2004, organizer McIntosh, three union officials, two members, and McIntosh's stepson, returned to the right-of-way on Oakfield Drive between the two entrances of the semicircular drive. On this occasion there was no rat. Organizer McIntosh referred to the Union's activities as "street theater." The individuals present conducted a mock funeral procession and handed out leaflets. Organizer Chris Stewart, Business Agent George Bayer, and two union members served as pallbearers. They carried a sheet metal coffin, fitted with handles and covered with contact paper so that it appeared to be wooden, in front of the Grim Reaper, the stepson of organizer McIntosh who was dressed in a black costume that reached a height of about 8 feet. He carried the Grim Reaper's traditional scythe, a realistic looking implement, but made from plastic. McIntosh and Business Manager Michael Jeske handed out leaflets. As the "funeral procession" proceeded, an audio system played Siegfried's Funeral March by Wagner, O Fortuna from Carl Orff's Carmina Burana, and Movement 3 from Chopin's Piano Sonata No. 2. The complaint alleges the music to be somber. Taken as a whole I concur, but note that O Fortuna is a loud choral piece, whereas the Chopin piece is quiet and meditative.

At some point between February 2003 and March 2004, the Oakfield Drive entrance to the Hospital had been designated as the entrance to the Women's Center. The main entrance was moved to Parsons Avenue. Although the Hospital had moved its main entrance, the current manager of safety services, Fordham Hutton, testified that the community continued to consider the Oakfield entrance to be the main entrance as it had been for 20 years and that "85 to 90 percent of our traffic would enter through the Women's Center." In March, Massey Metals employees were entering the site from Parsons Avenue which runs perpendicular to Oakfield Drive on the east side of the Hospital.

The pallbearers, followed by the Grim Reaper, carried the coffin on the sidewalk parallel to Oakfield drive to a point about 80 feet from the semicircular drive entrance on Oakfield, the former main entrance, where they turned and carried the coffin about 250 feet to the Moon entrance which they crossed and then continued on the Oakfield right-of-way another 150 feet where they turned and retraced their steps, again crossing the Moon entrance. Each time they crossed the Moon entrance they complied with the traffic signal, waiting for a green light to walk across if necessary. After each circuit, the pallbearers and Grim Reaper would take a break. Organizer McIntosh acknowledged that this "street theater" continued throughout a 2-hour period from 12 noon until 2 p.m. The procession was occurring approximately one half of the time.

Throughout the period, the Union distributed four separate leaflets, each of which bore the caption "Going to Brandon Regional Hospital should not be a Grave Decision." Under this caption is a black and white cartoon depicting six pallbearers outlined against the sky carrying a casket in a cemetery, as suggested by the outline of several headstones. The four separate leaflets each summarized facts relating to a lawsuit brought against the Hospital after a patient died at the Hospital or after alleged improper treatment at the Hospital. The last line of each

states: "A public service message from the Sheet Metal Workers' International Association."

Business Manager Michael Jeske acknowledged that the mock funeral procession was held because the union wanted the Hospital "to use Union sheet metal contractors on future construction projects" and "because the Hospital you know, they were using nonunion contractors . . . after we had sent information to the Hospital indicating that we had had problems with these contractors and what we believed were labor law violations and it didn't seem to affect the Hospital at all. So we were not happy about that." He further testified that the Union had learned "about the malpractice problems and we just saw that . . . corporate greed has victims[,] displaced Union construction workers or . . . patients who are subject to poor patient care. It all stems in our view from corporate greed."

The Union gave no notice to the Hospital prior to engaging in the mock funeral demonstration.

2. Analysis and concluding findings

a. The "Rat" and handbilling in January 2003

The complaint alleges that the Respondent's inflation of the rat and handbilling from January 9 through 15 threatened, restrained, and coerced the Hospital in violation of Section 8(b)(4)(ii)(B) of the Act. The Respondent's answer denies the allegations. There is no allegation regarding the Union's conduct between January 16 and February 20. No party has addressed that period, and the remedy sought herein would be unaffected.

The Respondent, in its brief, discusses "viewpoint discrimination" and argues the Union's First Amendment right of free speech citing various cases involving protests regarding controversial issues. Those arguments overlook the fact that the objectives of those protests are not proscribed. The objective of the Union in this case is proscribed.

The objective of the Respondent was to force the Hospital to cease doing business with Massey Metals, a nonunion contractor that was using employees provided by WTS, also a nonunion entity. The employees of those contractors were performing construction work on a new building located behind the main entrance to the Hospital. They entered the construction site from Vonderberg Drive, which runs perpendicular to Oakfield on the west side of the property of the Hospital. Despite this, the Union erected a 16-foot-tall rat in front of the Hospital wearing a Workers Temporary Staffing banner and distributed leaflets depicting a WTS rat caricature sitting in a patient's room. The Respondent's brief cites a defamation case that states that individuals cannot "reasonably interpret a cartoon as literally depicting an actual event or situation" and refers to the "explanatory text" underneath the cartoon, presumably the statement that "Workers Temporary Staffing (WTS) . . . employs workers on the construction site of the . . . expansion project." The cartoon, however, places the rat inside the Hospital. It is not installing sheet metal outside of the Hospital; it is sitting in a hospital room next to a patient. Thus, the cartoon and the text present contradictory information regarding the location of the rat. A cursory perusal of the leaflet leaves the impression that the dispute is with the Hospital and relates to patient care. The leaflet does not name the Sheet Metal Workers, and, therefore, it does not reflect that the entity responsible for the leaflet is a labor union and that its labor dispute is with Massey Metals and WTS.

Organizer McIntosh admitted that the Union's dispute with the Hospital related to its use of nonunion contractors. The Union's leaflet condemns tolerance for "companies like Workers Temporary Staffing." Insofar as such companies should not be "tolerated," the Hospital, in order to demonstrate its intolerance, would have to sever its relationship with those nonunion contractors. The object of cessation of doing business with nonunion contractors is further established by the testimony of Respondent Business Manager Jeske. When testifying regarding the Union's actions on March 15, 2004, Jeske acknowledged that the Respondent took that action because "they were using nonunion contractors . . . *after we had sent information* to the Hospital indicating that we had had problems with these contractors and what we believed were labor law violations and it didn't seem to affect the Hospital at all." (Emphasis added.) The foregoing testimony regarding the Respondent's displeasure with the Hospital's continued use of nonunion contractors constitutes direct evidence that its objective was to have the Hospital cease that use. See *Service Employees Local 254 (Women & Infants Hospital)*, 324 NLRB 743 (1997).

The Respondent expressed its displeasure with the Hospital by inflating its rat directly in front of the main entrance to the Hospital, midway between the entrances to the semicircular drive. Union members then began distributing the leaflet depicting a rat in the room of a patient. Organizer McIntosh admitted that the Union was "targeting the community, patients in the area" rather than WTS. He explained that the Union felt that the rat balloon "would probably get the attention of the public more than just regular handbills." Although the Union has also used the rat to promote its political agenda, any denial that the rat symbolized anything other than a labor dispute is contradicted by the Workers Temporary Staffing banner in 12-inch-high lettering prominently displayed to passing drivers on the rat's abdomen and the Union's leaflet which, consistent with Jeske's testimony, identified WTS as a "rat employer" that does not comply with "our local labor agreement." The Union, rather than providing signs or placards to the handbillers, used the rat, wearing the Workers Temporary Staffing banner, as a surrogate picket.

The Respondent, General Counsel, and Charging Party Hospital all cite *DeBartolo II*, 485 U.S. 568 (1988), for various propositions. The only conduct addressed by the Supreme Court in *DeBartolo II* was the peaceful distribution of handbills "without any accompanying picketing or patrolling." Id.at 571. Although the Respondent's brief asserts that the Court held that the leaflets therein were "truthful union publicity protected by the First Amendment," no such statement appears in that decision. The final paragraph of the decision makes clear that the construction by the Court, "interpreting Sec. 8(b)(4) as not reaching the handbilling involved" made it "unnecessary" to pass upon the "constitutional questions." Id. at 588. As the Charging Party Hospital points out, the Court has "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First

Amendment." *Longshoremen v. Allied International, Inc*., 456 U.S. 212, 226 (1982).

No party has cited, and I have found, no Board decision relating to the display of an inflatable rat in the context of secondary activity. I am mindful that, among cases decided by the Board, unions have used inflatable rats in numerous situations involving primary rather than secondary activity. See, e.g., *Celtic General Contractors*, 341 NLRB No. 116, JD slip op. at 4 (2004) (not reported in Board volumes). The critical difference is that primary activity is protected by the Act whereas secondary activity in which the object is to have an entity cease doing business with another is proscribed.

A picket is a person. Patrolling either with or without signs is not essential to a finding of picketing. *Service Employees Local 87 (Trinity Building Co.)*, 312 NLRB 715, 743 (1993); *Mine Workers (New Beckley Mining*), 304 NLRB 71, 72 (1991). "The important feature of picketing appears to be the 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 2797 (Stoltze Land & Lumber Co.*), 156 NLRB 388, 394 (1965). "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." *Service Employees Local 254 (Womens & Infants Hospital)*, supra at 749.

In *DeBartolo II*, the Court commented upon the absence of "any coercive effect on customers" and noted the absence of any violence, picketing, or patrolling, "only an attempt to persuade." 385 U.S. at 578. The Court distinguished picketing from publicity such as leafleting, referring to language in *Babbit v. Farm Workers*, 442 U.S. 289, 311 fn. 17 (1979), that "picketing is qualitatively 'different from other modes of communication,'" and citing the concurring opinion of Justice Stevens in *NLRB v. Retail Store Employees (Safeco*), 447 U.S. 607 at 619 (1980), which pointed out 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.'" Id. at 580.

The Respondent's conduct in inflating a 16-foot-tall rat displaying a banner as a surrogate for a picket defined the character of the Respondent's actions. The Respondent, in May 2002, had threatened to picket if the Hospital used nonunion contractors. In January 2003, McIntosh told Dodd Day, the Hospital's former safety and security manager, that "he was there picketing because one of our subcontractors was not union or he had some kind of union problem with the sheet metal subcontractor." McIntosh's admission that the Union chose to use the rat in its effort to "target" the public and patients reflects the confrontational rather than informational intent behind the Union's actions. I find that the Respondent engaged in picketing from January 9 through 15.

Even if it were to be found that the inflation of the rat as a surrogate picket and leafleting did not, standing alone, constitute picketing, the Respondent was engaged in picketing when union member Brandon Holly was present. On January 9, in addition to the rat, there were six individuals engaged in leafleting on behalf of the Union and Holly who stood at the Hospital entrance at the intersection of Oakfield and South Moon Avenue, the Moon entrance, holding a leaflet in front of his chest as a placard. The leaflet was at the eye level of drivers who had to pass Holly in order to enter the parking lot of the Hospital. Organizer McIntosh acknowledged that Holly did this for 2 days, on January 9, and on one other occasion. Despite being told to hold the leaflets at his side and hand them out, Holly "decided to do it his own way." I find that the Respondent's actions on January 9 and the other occasion that Holly was present constituted picketing.

"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." *Mine Workers (New Beckley Mining*), supra at 73. I have found that the inflation of the rat and accompanying leafleting, including specifically the activities of member Holly on the days that he was present, constituted picketing. Organizer McIntosh acknowledged that the Union was picketing. If, contrary to McIntosh's acknowledgement, it be found that the foregoing activities did not constitute picketing on the days that Holly was not present, I would find that the inflation of a 16-foot-tall rat wearing a banner directly in front of the entrance to the Hospital, coupled with the distribution of a leaflet depicting a rat in a patient's room and that does not identify the Sheet Metal Workers as its source and that the Respondent Union's labor dispute was with nonunion contractors Massey Metals and WTS, not the Hospital, was coercive conduct. The object of that conduct was to have the Hospital cease doing business with Massey Metals and WTS. The foregoing conduct violated Section 8(b)(4)(ii)(B) of the Act.

b. The "Street Theater" on March 15, 2004

The complaint alleges that the mock funeral procession constituted picketing and threatened, restrained, and coerced the Hospital in violation of Section 8(b)(4)(ii)(B). The Respondent's answer denies the allegations.

Business Manager Jeske admitted that the Union staged the mock funeral procession because the Union wanted the Hospital "to use Union sheet metal contractors on future construction projects" and because it continued to use nonunion contractors "after we had sent information to the Hospital indicating that we had had problems with these contractors." The object of the Respondent Union's action, to have the Hospital cease doing business with the companies that it had made an entrepreneurial decision to do business with, was unlawful.

The Respondent notes that Section 8(b)(4) prohibits activities that threaten, coerce, or restrain, argues that patrolling "refers to a gauntlet of protesters," and contends that its street theater, although "in questionable taste," was not unlawful.

I have found no case, and counsel have cited no case, holding that picketing for a proscribed objective is not coercive. Various coercive activities, strikes and picketing attendant thereto being the most obvious, are protected under the Act, as well they should be. Multiple injunctions have issued in various cases that limit the number of pickets, i.e., people, which may be present at a single location. As reflected in *Florida Wire & Cable*, 333 NLRB 378, 381 (2001), and *Clougherty Packing Co*., 292 NLRB 1139,1141 (1989), a limit of five pickets is not

unusual. There need be no "gauntlet of protesters" in order to establish coercion. Five individuals were involved in the mock funeral procession. Crossing a union's picket line to go to a destination, whether to a job or to a hospital for medical care, requires the individual doing so to either ignore or reject the message of the union. Although coercive, such coercion is protected under the Act when engaged in for a lawful rather than a proscribed purpose. It is prohibited when the purpose is proscribed.

The Respondent's brief acknowledges that its activities "may have offended some onlookers." An individual driving on Oakfield would have observed the procession. Any individual seeking to enter the Hospital at the Moon Drive entrance would have heard the music and encountered either the procession or leafleting. As aptly characterized by the Charging Party Hospital, individuals "were forced to view and cross a death march in order to patronize the Hospital." I find that the procession, four individuals carrying a coffin followed by the Grim Reaper to the accompaniment of solemn music, constituted picketing. Even if it were to be held that the procession did not constitute picketing, the funeral march in conjunction with leaflets referring to a person making a "grave decision" by going to the Hospital were coercive.

The Union had no organizational objective regarding the employees of the Hospital, and it had no dispute regarding the wages, hours, or working conditions of the employees of the Hospital. Its dispute with the Hospital was its continued use of nonunion contractors. Rather than peacefully persuade, the Union sought to injure the Hospital's reputation by its "street theater" accompanied by the distribution of leaflets referring to "grave decisions" and deaths and subsequent lawsuits. Even assuming that the Union intended to present such a message as a "public service," Jeske admitted that the Respondent's action was prompted by the Hospital's continued use of, i.e., its failure to have ceased doing business with, nonunion contractors. The proscribed objective need not be "the sole objective" of the proscribed conduct to constitute a violation of the Act. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689 (1951). By staging "street theater" on March 15, 2004, that consisted of patrolling the entrance to the Hospital with a casket and Grim Reaper, the Respondent engaged in picketing, a purpose of which was to coerce the Hospital into ceasing to use nonunion contractors. By engaging in the foregoing conduct, the Respondent violated Section 8(b)(4)(ii)(B) of the Act.

c. The 8(g) allegation

Section 8(g) of the Act requires that a labor organization give 10 days notice to a health care institution prior to picketing. I have found that the Respondent's conduct on March 15, 2004, constituted picketing. The foregoing conduct was engaged in with no prior notice to the Hospital. In *Service Employees Local 535 (Kaiser Foundation*), 313 NLRB 1201 (1994), the Board affirmed the finding of an administrative law judge that, notwithstanding the designation of the union sponsored event as a press conference, the "milling around" of union agents carrying signs regarding staffing levels during the 30 to 45 minute event constituted picketing, and the failure to give appropriate notice violated Section 8(g). The patrolling at 5-minute intervals over a 2-hour period in this proceeding presents an even clearer case of picketing. By picketing a health care institution without notice, the Respondent violated Section 8(g) of the Act.

CONCLUSIONS OF LAW

1. By unqualifiedly threatening to picket with the object of forcing Beall's, Inc. to cease doing business with Energy Air, Inc., at its jobsites in Oldsmar and Ormond Beach, Florida, the Respondent Sheet Metal Workers International Association, Local 15, AFL–CIO, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

2. By picketing at Galencare, Inc., d/b/a Brandon Regional Medical Center, with the object of forcing the Hospital to cease doing business with nonunion contractors Massey Metals and WTS, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

3. By failing to give notice to Galencare, Inc., d/b/a Brandon Regional Medical Center, of its intention to picket on March 15, 2004, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(g) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(b)(4)(ii)(B) and Section 8(g) of the Act, I shall recommend that it be ordered to cease and desist from such violations and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Sheet Metal Workers International Association, Local 15, AFL–CIO, Tampa, Florida, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Unqualifiedly threatening to picket with the object of forcing Beall's, Inc., or any other employer to cease doing business with Energy Air, Inc.

(b) Picketing Galencare, Inc., d/b/a Brandon Regional Medical Center, or any other employer with the object of forcing it to cease doing business with Massey Metals, Inc., and Workers Temporary Staffing or any other employer with whom the Respondent Union may have a dispute.

(c) Failing to give notice to Galencare, Inc., d/b/a Brandon Regional Medical Center, of its intention to engage in picketing at its facility located in Brandon, Florida.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices and all meeting halls within its jurisdiction

[3] 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.

copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Local 15's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(b) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to all of its members. The notice shall be mailed to the last known address of each member after being signed by the Respondent's authorized representative.

(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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[4] 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."