Southwest Regional Council of Carpenters and United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498 *and* New Star General Contractors, Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* East-West Partners—Denver, Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* East-West Partners—Denver, Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Terry Staples, an Individual

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Terry Staples, an Individual

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* New Star General Contractors, Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* New Star General Contractors, Inc.

Southwest Regional Council of Carpenters *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

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United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* New Star General Contractors, Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

Southwest Regional Council of Carpenters *and* Okland Construction Company, Inc. 61 United Brotherhood of Carpenters and Joiners of America, Local 184 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* Okland Construction Co., Inc.

United Brotherhood of Carpenters and Joiners of America, Local 184 *and* New Star General Contractors, Inc.

United Brotherhood of Carpenters and Joiners of America, Local 1498 *and* New Star General Contractors, Inc. Cases 27–CC–877, 27–CC–878, 27–CC–879, 27–CC–880, 27–CC–881, 27–CC–882, 27–CC–883, 27–CC–886, 27–CC–87, 27–CC–888 27–CC–889, 27–CC–890, 27–CC–892, 27–CC–893, 27–CC–898, 27–CC–899, 27–CC–900, 27–CC–901, 27–CC–906, 27–CC–907, 27–CC–912, 27–CC–913, 27–CC–915, 27–CC–916, 27–CC–917, 27–CC–924, 27–CC–925, 27–CC–927, and 27–CC–928

February 3, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

This case raises the question whether the Respondent Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act by displaying large, stationary banners proclaiming a "labor dispute" and seeking to "shame" named secondary employers at their business locations.[1] The judge found that the Unions' displays of banners at 19 different locations did not violate Section 8(b)(4)(ii)(B) because the displays were not picketing and did not otherwise constitute threats, coercion, or restraint within the meaning of that section. He also found that the banner displays at two construction sites with established reserve gates did not violate Section 8(b)(4)(i)(B) because the displays were not picketing and did not induce or encourage the employees of secondary employees to cease doing work within the meaning of that section. The judge therefore dismissed the complaint as to both sections of the Act.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's conclusions, consistent with our recent decisions in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.*), 355 NLRB 811 (2010) (*Eliason*), and *Carpenters Local 1506 (Marriott Warner Center Woodland Hills*), 355 NLRB 1346 (2010) (*Marriott*), and for the reasons stated below.

In *Eliason*, supra, we concluded that a union's display of large stationary banners did not violate Section 8(b)(4)(ii)(B) of the Act. We find that the banner displays in this case were, for all relevant purposes, the same as the conduct found lawful in *Eliason.* We therefore adopt the judge's conclusions that the Unions' conduct did not violate Section 8(b)(4)(ii)(B).

We must also address the aspect of this case that was not present in *Eliason*: the allegations that the banner displays at two construction sites violated Section 8(b)(4)(i)(B). The relevant background to these allegations is as follows. In 2004, the Unions called a strike among the employees of two construction employers, New Star General Contractors Inc. (New Star) and Okland Construction Co. (Okland). At various times during those strikes, the Unions sent letters to secondary employers who had hired New Star or Okland, informing them of the strike and asking them to use their managerial discretion not to do business with either company.

During the strikes, the Unions displayed banners at 19 different sites associated with secondary employers. The Unions also distributed or made available handbills that, according to the judge, provided a "fairly detailed" explanation of the dispute, including "the connection between either New Star or Okland and the entity named on the banner." Okland was the general contractor at two of the jobsites, the Stampin' Up and West Jordan Courts construction sites, and established reserve gate systems at both sites. At each site, posted signs directed Okland personnel to use one gate and directed all other entities and persons to use different gates. The Unions did not confine their banners to areas immediately proximate to the Okland gates.[2] Perry Olsen Drywall, the only subcontractor with employees represented by any of the Unions, was also present at both jobsites during the banner displays.

The General Counsel alleged that the banner displays at the Stampin' Up and West Jordan Courts sites constituted unlawful common situs picketing in violation of both Section 8(b)(4)(i)(b) and (ii)(B). The judge dismissed these allegations, finding that the banner displays did not constitute either picketing or signal picketing. In his exceptions, the General Counsel argues that the Unions' conduct violated Section 8(b)(4)(i)(B) because: (1) the banner displays constituted picketing or signal picketing and (2) the Unions engaged in that conduct while failing to meet the Board's requirements for lawful picketing at a common situs with a reserve gate system. See *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).[3] Specifically, the General Counsel asserts that the Unions' use of the term "labor dispute" on its banner signaled employees of the secondary employers to cease work. We disagree.

[1] On November 12, 2004, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief which Charging Parties Okland Construction Co., Inc. and New Star General Contractors, Inc. have joined. The Respondent Unions Southwest Regional Council of Carpenters and Carpenters Local Nos. 184 and 1498 filed a joint answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, but only for the reasons set forth below.

[2] At the Stampin' Up jobsite, the Union displayed its banner 10–15 feet from the gate reserved for the non-Okland personnel. At the West Jordan Courts jobsite, the Union displayed its banner 300–350 feet from the gate for the non-Okland personnel.

[3] A "common situs" refers to a workplace shared by the employees of both primary and secondary employers. In *Moore Dry Dock*, supra, the Board required picketing at common situs gates to adhere to the following rules: (a) the picketing must be strictly limited to times when employees of the primary employer are on the common situs; (b) the picketing must occur only when the primary employer is engaged in its normal business at the common situs; (c) the picketing must be limited to places reasonably close to the primary employer's location at the common situs; and (d) the picketing must disclose clearly that the dispute is with the primary employer. Id. Picketing that does not follow these rules is presumed to have an unlawful secondary object.

In *Eliason*, supra, 355 NLRB 811, the Board reaffirmed its adherence to longstanding Supreme Court precedent concerning Section 8(b)(4), holding that unions may engage in a range of persuasive activities, none of which may be found unlawful unless it violates the specific prohibitions of that section. Id. at 814 Section 8(b)(4)(i)(B), in particular, is violated by picketing or other activity that induces or encourages the employees of a secondary employer to stop work, where an object is to compel that employer to cease doing business with the struck or primary employer. Unless both of those elements are demonstrated, no violation of the Act may be found. Activity intended only to educate consumers, secondary employers, or secondary employees, and even prompt them to action—so long as the action is not a cessation of work by the secondary employees—is lawful.

For the reasons given in *Eliason*, and those discussed below, we find that the General Counsel has not established that the Unions' display of banners at the Stampin' Up and West Jordan Courts jobsites constituted either picketing or signal picketing. Consequently, there is no basis for the General Counsel's *Moore Dry Dock* theory—the only theory he advanced regarding the 8(b)(4)(i)(B) allegations in this case. Further, there is no basis for finding that the Unions' displays of banners otherwise violated that section.

In *Eliason*, supra, the Board found that the banner displays did not constitute picketing because they lacked the "element of confrontation [that] has long been central to our conception of picketing for purposes of the Act's prohibition." 355 NLRB 811, 816. The banner displays did not involve the "core" conduct of "traditional" picketing—the combination of carrying picket signs and patrolling. The Board further found that the banner displays were not disruptive of the secondary employers' normal operations or otherwise coercive. Id. at 20. In respect to these characteristics, we find that the Unions' conduct in displaying the banners at the two construction sites at issue here was identical to that found lawful in *Eliason*, supra. We therefore agree with the judge that the banner displays in this case did not constitute picketing.

The Board went on in *Eliason* to consider whether the banner displays constituted "signal picketing," a variant of picketing, defined as "activity short of picketing through which a union intentionally, if implicitly, directs members not to work at the targeted premises." Id. at 19. The Board found that "nothing about the banner displays or any extrinsic evidence indicates any prearranged or generally understood signal by union representatives to employees of the secondary employers or any other employees to cease work." Id. The Board found an "absence of evidence that the [u]nion did anything other than seek to communicate the existence of its labor dispute to members of the general public." Id. at 19. In contrast to prior decisions in which the Board found signal picketing, in *Eliason* there was no evidence that the union sought "to induce or encourage a work stoppage or refusal to handle goods or perform services." Id. at 19 fn. 28 (discussing prior cases).[4] The Board thus concluded that the banner displays in *Eliason* did not constitute signal picketing.

We similarly find no evidence here that the Unions' banner displays were a "prearranged or generally understood signal" to any employees to cease work. As in *Eliason*, none of the banners called for or declared a strike or any other form of job action. The banner holders did not discuss their protest with interested passersby, other than to give them a handbill explaining the nature of the labor dispute. That handbill, moreover, explicitly stated that the Unions were *not* urging anyone to refuse to work or deliver goods.[5] Further, there is no indication that the banner displays were an effort to continue prior picketing by the Unions much less picketing which could not itself have lawfully been continued.[6] Finally, there is no evidence that any employees actually stopped work at any time during the banner displays, which took place continuously for 6 weeks at the Stampin' Up site and for approximately 2 months at West Jordan Courts.[7] In-

[4] The Board also noted that typically signal picketing is alleged to violate Sec. 8(b)(4)(i)(B) and there was no such allegation in *Eliason*. Id. at 19 fn. 27.

[5] In his dissent, Member Hayes relies on *Painters District Council 9 (We're Associates)*, 329 NLRB 140 (1999), and *Teamsters Local 917 (Industry City)*, 307 NLRB 1419, 1422–1423 (1992), to support his contention that the Board has declined to rely on a union's disclaimer of an intent to cause a work stoppage. Both cases, however, involved traditional picketing at secondary sites and thus are inapposite to the banner displays (and accompanying handbills) at issue in this case. As discussed below, picketing at a reserve gate conveys a well-established message asking employees of secondary employers to cease work. Therefore, to find the disclaimer of such a purpose here irrelevant, on the grounds that the Board had done so in cases involving picketing, is not justified.

[6] See *Eliason*, supra, 355 NLRB 811, 817–818. See also discussion in *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB 21, 22 (2010) (*Held Properties I*) (banner displays are not coercive under Sec. 8(b)(4)(ii)(B) merely because they are preceded by area standards picketing that could have continued lawfully).

[7] Compare *Iron Workers Pacific-Northwest Council (Hoffman Construction)*, 292 NLRB 562 fn. 2 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (union representatives "posted" around a stationary sign near neutral gate talked to employees approaching the gates and the employees turned around and left); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 530, 541 (1982) (union representatives stationed at delivery entrances to construction sites and approached trucks making deliveries to explain that the union was engaged in a job action; the trucks turned back); *Teamsters Local 182*

deed, we have now decided 10 cases, including this case, involving similar banner displays conducted by local unions affiliated with the United Brotherhood of Carpenters and Joiners of America, and many of the cases involved displays at multiple locations sometimes for extended periods of time.[8] The 10 cases involved, in total, banner displays at 54 separate locations. In each of these cases, the General Counsel has argued that the banners were a signal to employees to cease work yet in not one case has there been any evidence that any employee, in fact, ceased work in any manner. The signal the General Counsel alleges is being sent by the banners does not appear to have been understood as such by any secondary employees.[9]

This case differs from *Eliason*, however, in two factual respects.[10] First, the construction sites here were not open to the general public. As noted, access to both the Stampin' Up and West Jordan Courts sites required turning off a main thoroughfare and travelling several hundred feet on an access road to each site's gates. The Unions nevertheless displayed their banners at both sites at locations where they could be read by passing automobile traffic on busy roads. Second, unlike in *Eliason*, employees of a subcontractor (Perry Olson Drywall) who were represented by one or more of the Unions displaying the banners were working at both sites. Because they were represented by one of the Unions displaying the banners, those employees arguably would have been more attuned to a signal to stop work—if one had been given. Nonetheless, in the absence of evidence (beyond the display itself and its location) that the display of banners adjacent to the construction sites was intended to operate as a request or would reasonably have been understood as a request to employees of secondary employers to cease work, we do not find these circumstances sufficient to distinguish the facts in this case from those in *Eliason*.[11]

In 8(b)(4)(i)(B) cases, the evidence must prove that the alleged conduct "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer." *Teamsters Local 122*, 334 NLRB at 1191–1192 fn. 8, quoting *Los Angeles Building Trades Council*, 215 NLRB 288, 290 (1974). For the reasons discussed above, we find that the General Counsel has failed to carry his burden of proof on this issue in relation to the banner displays at the West Jordan Courts and Stampin' Up sites.

The dissent relies heavily on *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 953 (D.C. Cir. 1999), denying en-

(Woodward Motors), 135 NLRB 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (signal picketing found when union placed picket signs in snow bank and union representatives approached delivery trucks to speak to the driver, after which the drivers left without making deliveries).

[8] *Eliason*, supra; *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)*, 355 NLRB 1131 (2010); *Carpenters Local 1506 (AGC San Diego Chapter)*, 355 NLRB 1151 (2010); *Southwest Regional Council of Carpenters (Carignan Construction)*, 355 NLRB 1315 (2010); *Marriott*, supra; *Southwest Regional Council of Carpenters (Richie's)*; *Held Properties I*, supra; *Southwest Regional Council of Carpenters (Held Properties)*, 356 NLRB 42 (2010) (*Held Properties II*); *Mid-Atlantic Regional Council of Carpenters (Starkey Construction Co.)*, 356 NLRB 61 (2010).

[9] Our dissenting colleague contends that, by citing the absence of any work stoppages caused by the banner displays, we have abandoned an objective standard in determining whether the banner displays were "reasonably . . . understood" as a signal to secondary employees to stop work and that we are now requiring evidence that the signal actually caused secondary employees to cease work. We do not, however, hold that proof of impact is an indispensable element of an affirmative case that Sec. 8(b)(4)(i) has been violated. If a union asks employees of a secondary employer to strike, the request violates Sec. 8(b)(4)(i) whether the employees heed the request or not. The same is true if a union establishes a traditional picket line at a reserve gate because of the well-established message conveyed by such picketing. Thus, it is not surprising that all the cases cited in the dissent on this point involved traditional picketing. See *Painters District Council 9 (We're Associates)*, 329 NLRB at 143; *Operating Engineers Local 150 (Hamstra Builders)*, 304 NLRB 482, 484 (1991). But where the question before us is whether conduct constituted or would reasonably have been understood to constitute such a request, as is the case here, evidence of its impact (or lack thereof) is relevant. In other words, we are relying, in part, on the absence of any impact in 54 separate incidents involving almost-identical banners in 10 separate Board cases in assessing the reasonableness of the proposition that the banner displays operated as a signal to employees of secondary employers to cease work. In prior cases involving ambiguous communications, the Board has cited the absence of any work stoppage in holding expressive conduct was not unlawful. See *Teamsters Local 122 (August A. Busch)*, 334 NLRB 1190, 1192 (2001).

[10] In addition, here, unlike in *Eliason*, the complaint alleged a violation of Sec. 8(b)(4)(i)(B) (as well as Sec. 8(b)(4)(ii)(B)) in relation to the banner displays at these two sites, as stated above.

[11] We do not hold, as our dissenting colleague appears to suggest, that displays of stationary banners cannot violate Sec. 8(b)(4)(i), but only that they cannot do so absent other evidence supporting the inference of unlawful inducement or encouragement to engage in a work stoppage. All the cases cited in the dissent involved additional evidence of the type absent here. In addition to the court of appeals' decision in *Warshawsky*, discussed infra, in *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999), the union engaged in unlawful, secondary picketing at the same nonreserve gate through the same agent who, 3 days later, surreptitiously, but repeatedly, displayed a sign in the middle of the gate and spoke to employees approaching the gate who, then, turned away. In addition, several union agents engaged in picketing at the reserve gate walked slowly to the nonreserve gate to converse with the agent stationed there and then walked slowly back. In *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 437–438 (1995), the conduct involved six to eight individuals carrying "conventional picket signs," patrolling across the gate and causing secondary employees to refuse to work. Contrary to our dissenting colleague, we do not read the judge's decision in that case to find an independent violation based on the union's use of an observer at a reserve gate dressed in a rat costume. Rather, the judge explained, "I am of the view that the unions' overall course of conduct at gates 2 and 3 was unlawful." Id. at 438.

forcement of 325 NLRB 748 (1998), where the court of appeals held, contrary to the Board, that union handbilling "sought to induce" secondary employees to cease work. The court based this finding on evidence showing that (1) the union's handbilling was located on an access road to a construction site and took place only when secondary employees were reporting to work and the employees of the primary employer were not on the site; (2) conversations (of unknown content) took place between the handbillers and secondary employees; and (3) during each of the 5 days the union distributed handbills, the activity "resulted in the employees of the [general contractor] and its subcontractors refusing to enter the site and refusing to perform services for their employers." Id. at 950.

In this case, as in *Warshawsky*, the banners were located proximate to construction sites. The similarities end there, however. First, unlike in *Warshawsky*, the Unions did not time the display of the banners to coincide with secondary employees' reporting times. In fact, the judge found that at West Jordan Courts, "the banner was usually up from about 10 a.m. or 11 a.m. until about 1 p.m. each day. Jeff Hale [the site superintendent] acknowledged that the employees of subcontractors were at work before the banner holders arrived, and the banner holders left the project each day before the employees of the subcontractors finished their workday."[12] The evidence is less conclusive but suggests the same was true at the Stampin' Up site. Second, there is no evidence here that the banner holders conversed with the secondary employees (other than to distribute the handbill). Third, there is no allegation or evidence in this case that any secondary employees actually ceased work at any time or in any manner. Finally, the banners faced well-travelled public roads and thus could be observed by members of the public as well as secondary employees. At the West Jordan Courts site, the banner was displayed facing a public road, at a location 20–30 feet away from the access road leading to the construction site and 300 to 350 feet away from the gate reserved for secondary employees. At Stampin' Up, the banner was displayed 10–15 feet from a gate reserved for secondary employees, but at a location close to and facing a well-travelled public road.[13] Thus, unlike in *Warshawsky*, the communication was not "de facto directed only at neutral employees." Id. at 954. Under these circumstances, we cannot find that the secondary employees would reasonably have understood that the Unions were asking them, through the display of the banners, to stop work for their employers.

Finally, we do not read the D.C. Circuit's decision in *Warshawsky* to conclude that the mere fact that a communication concerning a labor dispute takes place at a construction site not open to the general public suggests either that it is "de facto directed only at the neutral employees," 182 F.3d at 954, or, even if that were true, that the communication constitutes an unlawful inducement or encouragement for employees to engage in a work stoppage. As stated above, the public could observe the banners as they travelled on unrestricted roads adjacent to the jobsite. Moreover, many people other than employees enter construction sites, most importantly, their employers and those purchasing their employers' services, i.e., owners and managers of general contractors, property owners, and the entity for which the building is being built. A union may lawfully appeal to those "consumers" of a primary construction employer's services to cease doing business with the primary employer so long as the appeal is not backed by any coercion forbidden by Section 8(b)(4)(ii). See *Eliason*, 355 NLRB 811, supra, at 814, citing *Edward DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 579 (1988). In fact, the Unions here appealed to the secondary employers via letter to do exactly that prior to the commencement of the banner displays. Finally, a union may want to communicate with employees of secondary employers about a labor dispute for many reasons other than to induce them to stop work. Educating the employees of the secondary employers, particularly those who are union members, about the dispute may cause them to speak with the managers of the primary employer and urge them to respect area standards or to talk with the employees of the primary employer, express their solidarity, and encourage them to seek to improve their wages and other terms of employment. Simply protesting against substandard wages sends a message to all the employees on the site that the union will take action to protect them and thereby raises the union's standing among the employees. Among all these lawful messages the Unions sent by protesting substandard wages at the construction sites, we do not find, without any further evidence, that employees of secondary employers on the site would reasonably understand the protest to be im-

[12] The superintendent also testified that deliveries were made during the time period when the banner was typically displayed and that some secondary employees left the site to eat lunch and returned during that period, but those facts do not undermine the conclusion that here, unlike in *Warshawsky*, the Unions were not conducting their activity at the optimal time if their intention was to induce a work stoppage.

[13] The record is unclear as to whether the banner at the Stampin' Up site was on the access road itself. However, the side of the jobsite where the secondary gates were located fronts onto a well-travelled public road. The banner at this location, which faced the road, was clearly visible to passing motorists.

plicitly sending the message forbidden by Section 8(b)(4)(i)(B).[14]

The dissent reads the court's decision in *Warshawsky* so broadly as to permit construction employers, by simply confining employees of the primary employer to a reserve gate, to call on the Board to prohibit all communication between a union involved in a dispute with the primary employer and all others entering the site. "Even handbilling alone," the dissent contends, "falls within the statutory prohibition."[15] It does not matter, according to the dissent, that the union expressly states that it is not calling on anyone to cease work and it does not matter that no one does cease work. The dissent's position thus cuts to the heart of employees' statutory right to engage in concerted activities, which Congress expressly did not confine to "employees of a particular employer, unless the Act explicitly states otherwise."[16] The dissent assumes, without any supporting evidence, that the Unions sought to evade the law's proscription and that employees reasonably respond to any mention of a labor dispute by striking. We do not find either assumption warranted.[17] Section 8(b)(4)(i) certainly does not expressly require the broad ban on communication among employees of different employers endorsed by the dissent. Nor does such a broad ban extending to the form of expression at issue here appear necessary to effect the purposes of Section 8(b)(4)(i) when, over an extended period of time and at many, diverse locations the use of stationary banners has not, in any instance, led to the extension of industrial unrest feared by Congress. For these reasons, the broad ban on peaceful, expressive activity endorsed in the dissent is inconsistent with Section 7 of the Act, is not mandated by Section 8(b)(4)(i), and, as we explained in *Eliason*, would create serious constitutional questions.[18] We therefore agree with the judge that the banner displays did not constitute signal picketing or otherwise violate Section 8(b)(4)(i)(B) of the Act.

In sum, we find that the General Counsel has not demonstrated that the Unions' peaceful banner displays violated Section 8(b)(4)(i) or (ii)(B) of the Act. Consequently, we do not find a violation of either section.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER HAYES, dissenting.

In this case, the majority extends the reasoning of *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.) (Eliason)*, 355 NLRB 811 (2010), to further restrict the scope of the proscription of secondary activity in Section 8(b)(4) of the Act. They reassert that union bannering activity at the site of a neutral employer in furtherance of a secondary boycott objective cannot be found to threaten, coerce, or restrain that employer within the meaning of Section 8(b)(4)(ii); and they now assert that such activity does not induce or encourage employees of the neutral within the meaning of Section 8(b)(4)(i). As in *Eliason*, I dissent from my colleagues' unwarranted subversion of the Congressional intent to "[shield] unoffending employers and others from pressures in controversies not their own."[1]

The fact pattern in this case is a familiar one. Agents of the Respondent Unions held large banners proximate to the premises of a large number of neutral employers

[14] The case cited in the dissent, *We're Associates*, supra, 329 NLRB at 142, is inapposite because it involved traditional picketing.

[15] The dissent states, "decades of settled law make clear that a union's ability to communicate with neutral employees is affected by a reserve gate system." But those decades of precedent rest on the case cited by the dissent, *Moore Dry Dock*, supra, which regulates unions' right to *picket* at reserve gates not their right generally "to communicate with neutral employees." That is why the General Counsel argued that the conduct at issue was inconsistent with *Moore Dry Dock's* standards only on the grounds that it was picketing. As explained above, we have concluded that it was not. Secondary employers are protected by Sec. 8(b)(4)(i) from communications that "induce or encourage" their employees to strike, not from all efforts by a union engaged in a dispute with another employer to communicate with the secondary employer's employees.

[16] 29 U.S.C. § 152(13).

[17] The latter assumption is particularly unwarranted in light of the facts that employees who strike in violation of a contractual no-strike clause can be fired and any employees who strike absent unfair labor practices risk permanent replacement.

[18] The dissent contends that, unlike in *Eliason*, the doctrine of constitutional avoidance offers "no refuge" in this case. We do not, however, consider construction of the Act to avoid raising serious constitutional questions a "refuge," but rather a duty imposed on the Board by the Supreme Court. See *DeBartolo*, 485 U.S. at 577 (constitutional avoidance doctrine requires inquiry as whether there is an available, alternative interpretation of statutory language that does not raise "serous constitutional concerns"). Moreover, the Court's statement in *Electrical Workers Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 694, 705 (1951), that the prohibition in Sec. 8(b)(4)(i) "carries no constitutional abridgement of free speech," cannot be read as expansively as it is in the dissent. See also *Warshawsky*, supra at 952. Speech that is reasonably understood to encourage or induce proscribed action is not constitutionally protected, but merely alleging that speech falls into that category does not operate to strip it of protection. Finally, it is our colleague's expansive view of the terms "induce or encourage" in Sec. 8(b)(4)(i) to cover almost any expression concerning a labor dispute made in the vicinity of secondary employees at a gated construction site that implicates the protections of the First Amendment and necessitates the application of the constitutional avoidance doctrine. Thus, as in *Eliason*, we reach our holding here based on a construction of the Act, but that construction is consistent with and supported by our duty to avoid construing the Act in a manner that raises serious constitutional questions.

[1] *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

who have done or are doing business with employers with whom the Union has a primary labor dispute. For the most part, this bannering activity took place at office buildings frequented by the public. However, two of the locations were construction jobsites not open to the general public: a Stampin' Up distribution center in Riverton, Utah, and the West Jordan, Utah courthouse. At those locations, union agents handbilled and displayed their banners at gates reserved for the use of neutral employers.

The complaint alleges that all of the bannering activity at issue in this case violated Section 8(b)(4)(ii)(B), which prohibits threats, restraint, or coercion in pursuit of a proscribed secondary objective. This bannering is essentially the same as in *Eliason*, supra. For the reasons fully set forth in the joint dissent in that case, I would find a violation here as well. The predominate element of such bannering is confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the neutral employers' businesses, and thereby to further an objective of forcing those employers to cease doing business with the primary employers in the labor dispute. This bannering activity was the "confrontational equivalent of picketing," and thus the precise evil Congress sought to outlaw through Section 8(b)(4)(ii)(B), and the proscription of this conduct raises no Constitutional concerns.

The complaint further alleges that the bannering and leafleting at the Stampin' Up and West Jordan jobsites violated Section 8(b)(4)(i)(B). That section of the Act prohibits unions from inducing or encouraging employees to engage in a work stoppage if an object thereof is to force any person to cease doing business with another person. For the reasons that follow, I would find this violation as well.

Section 8(b)(4)(i)(B) broadly prohibits

> every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by these terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case, there would have been little need for § 8(b)(4) defining the proscribed objectives, because the use of "restraint and coercion" for any purpose was prohibited in the whole field by § 8(b)(1)(A).

Electrical Workers Local 501 v. NLRB (Samuel Langer), 341 U.S. 694, 701–702 (1951). The Court further recognized that this prohibition "carries no constitutional abridgement of free speech." Id. at 705.

Picketing constitutes proscribed inducement and encouragement. *Samuel Langer*, supra (union agent patrolling in front of site with placard reading "This job is unfair to organized labor" and name of local union). Other conduct, often called "signal picketing," also violates Section 8(b)(4)(i)(B), even though it does not involve patrolling with picket signs. *Electrical Workers Local 98 (Telephone Man*), 327 NLRB 593 (1999) (union agent stationed at neutral gate wore "observer" sign that "conveniently flipped over" to show sign stating neutral did not observe union wages; agent spoke to persons entering premises some of whom turned away). Even handbilling alone, unaccompanied by any picketing, falls within the statutory prohibition. *Warshawsky & Co. v. NLRB*, 182 F.3d 948 (D.C. Cir. 1999), cert. denied 529 U.S. 1003 (2000).

No actual impact on neutrals need be proven to establish a violation of Section 8(b)(4)(i)(B). *Operating Engineers Local 150 (Hamstra Builders*), 304 NLRB 482, 484 (1991) (union agents patrolled neutral gate with area standards signs; no evidence employees ceased work because of picketing). See also *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 143 (1999) (citing cases). But a violation does require proof that the union's statements or conduct directed at employees of a neutral employer "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer." *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1191 (2001) (citing *Los Angeles Building Trades Council*, 215 NLRB 288, 290 (1974)), enfd. No. 01–1513 (D.C. Cir. 2003).

In this case, the Unions' banners were held at two construction jobsite gates reserved for neutral employers and relatively distant from areas frequented by the public. They announced the existence of a "labor dispute" and, significantly, named only the neutral employer. The conduct was the confrontational equivalent of picketing for all the reasons stated in the joint dissent in *Eliason*. The prominent announcement of a "labor dispute" at the neutral gate plainly sought to "create the impression that this was an unfair job, and that the Union was requesting neutral employees, including deliverymen and suppliers (who might approach the gate at any time) not to enter the project." *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 437–438 (1995) (unlawful inducement or encouragement where union, inter alia, stationed "observer" in rat costume at neutral gate), enfd.

in pertinent part 154 F.3d 137 (3d Cir. 1998).[2] As such, the union plainly violated Section 8(b)(4)(i)(B) by the conduct described above.[3] Id.; see also *Hamstra Builders*, supra (area standards signs at neutral gate was unlawful inducement or encouragement).

In finding no unlawful inducement or encouragement here, my colleagues adopt a standard that unjustifiably narrows the intended scope of Section 8(b)(4)(i)(B). Thus, the majority gives great weight to the failure of this or any other bannering to actually induce a work stoppage as evidence that the conduct would not reasonably be understood as a signal to engage in one. In fact, as shown above, the test is an objective one and evidence of impact is not required. My colleagues next note that the banners could be viewed as lawful area standards "educational" appeals to members of the public, including employees of the neutral. They rely as well on language in the Unions' handbills disclaiming any intent to cause a work stoppage as evidence that none was sought. The Board has rejected such arguments in the past, and should do so here. See, e.g., *Painters District Council 9 (We're Associates)*, supra, 329 NLRB 140 (placards stating neutral used paperhangers that were under investigation for discrimination was unlawful inducement, rejecting claim it was "demonstration" protected by First Amendment); *Teamsters Local 917 (Industry City)*, 307 NLRB 1419, 1422–1423 (1992) (placards asserting area standards dispute and calling for boycott of neutrals "patently sought to induce employees to cease working" despite statement disclaiming intent to induce work stoppage).

The majority asserts that this precedent is distinguishable because in the prior cases the Board found that the unions engaged in picketing—a finding my colleagues are not willing to make on these facts. Of course, the bannering at issue here was picketing for all the reasons stated in the joint dissent in *Eliason.* Putting that aside, Section 8(b)(4)(i)(B) draws no distinction between an inducement or encouragement to strike that involves picketing and one that does not. To the contrary, "every form of influence and persuasion" is equally prohibited—regardless of the method used. *Samuel Langer*, supra, 341 U.S. at 701–702.

The majority also dismisses the significance of the reserve gate systems established at the jobsites as a basis for regulation of the Unions' activity at those locations. Unions must be free to communicate with neutral employees despite a valid reserve gate, my colleagues contend, in order to "educate" them about the union's dispute with the primary employer. But decades of settled law make clear that a union's ability to communicate with neutral employees is affected by a reserve gate system. See, e.g., *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950) (establishing standards for common situs picketing).[4] These restrictions are mandated in order to afford neutral employers the protection from secondary activity to which they are entitled under Section 8(b)(4).[5]

The majority further asserts that their construction of Section 8(b)(4)(i)(B) is required because a broader reading of the statutory prohibition would raise constitutional issues. To the contrary, the Supreme Court has instructed us that no constitutional issue is presented in this context. See *Samuel Langer*, supra. My colleagues cite no precedential authority to support their position that the Court did not mean what it said. Moreover, the D.C. Circuit has squarely rejected the precise argument the majority here advances, and my colleagues offer no valid reason for disregarding these settled principles. See *Warshawsky & Co. v. NLRB*, supra (rejecting Board's contention that the words "induce or encourage" must be read narrowly to avoid constitutional issues and explaining that "the First Amendment is not at all implicated" because prohibiting

[2] In *Delcard Associates*, the Board adopted the judge's decision concluding that "by utilizing an 'observer' in a rat costume . . . [the union] intentionally sought to create the impression that this was an unfair job, and that the Union was requesting neutral employees, including deliverymen and suppliers (who might approach the gate at any time) not to enter the project. The Union thereby unlawfully induced and encouraged neutral employees not to perform services at the jobsite." 316 NLRB at 438. Contrary to the implication of the majority, the Board did not rely on the other instances of unlawful conduct in that case in finding that this activity was an independent violation of the Act.

[3] In *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1215–1216 (9th Cir. 2005), the court concluded that the bannering at issue there could not be proscribed under Sec. 8(b)(4)(ii)(B) as signal picketing because it was directed at the public rather than employees of the neutral employers and hence was not "sufficiently coercive to fall within the meaning of § 8(b)(4)(ii)." I respectfully disagree with the court's interpretation of Sec. 8(b)(4)(ii)(B) for the reasons stated in the joint dissent in *Eliason.* Regardless, the court's discussion of signal picketing has no bearing on whether the conduct at issue in this case violated Sec. 8(b)(4)(i)(B)—which prohibits all inducement or encouragement whether coercive or not.

[4] Among other things, a union seeking to picket in that setting must clearly disclose that its dispute is with the primary employer—a requirement flouted by the Union in this case. Instead, the banners made no mention of the primary employer and proclaimed a labor dispute solely with the neutral employers. I respectfully disagree with my colleagues' apparent suggestion that the banners had the purpose or effect of educating anyone about the Union's primary labor dispute under these circumstances.

[5] Contrary to the majority, adherence to long-established Board law in this area does not "prohibit *all* communication between a union and" neutral employees nor do I espouse any such prohibition (emphasis in original). Unions simply must take care that the content of the communication and the manner in which it is expressed do not run afoul of Sec. 8(b)(4). In this case, the Unions clearly failed to do so.

"an appeal limited to employees of a neutral employerdoes not raise any constitutional problems").

By disregarding these established principles, the majority effectively narrows Section 8(b)(4)(i)(B) to the point that it proscribes only picketing for a forbidden work stoppage or, perhaps, an explicit call for one by other means. The Board mistakenly attempted a similar limitation on the scope of Section 8(b)(4)(i)(B) in *Iron Workers Local 386 (Warshawsky & Co.*), 325 NLRB 748 (1998), petition. for review granted sub nom. *Warshawsky & Co. v. NLRB*, supra. In that case, union agents distributed handbills accusing the primary employer of undermining area standards at the neutral gate of a common situs construction site that, like those here, was not open to the public. There was no picketing in that case, but the union agents spoke to approaching neutral employees, who thereafter refused to enter the site. The Board found no evidence of prohibited inducement because the handbills only mentioned the primary employer, did not expressly call for a work stoppage, and included a small print disclaimer that no such stoppage was sought. There was no evidence what the union agents said to the employees, and the Board thought the conduct could be viewed as publicizing the primary's allegedly substandard wages to the "public" in part because the neutral employees were part of the public.

The D.C. Circuit rejected this finding as unreasonable. It found that the evidence could only support the inference of unlawful inducement where: the union approached only the neutral employees with the handbills, it did so at a site not accessible to the public, it ignored the reserved gate, and it handbilled at times when the neutral employees reported for work.

My colleagues labor mightily to distinguish this adverse precedent, but their efforts fall short. As in *Warshawsky*, the Union here distributed handbills and displayed its banner at the neutral gate of jobsite not open to the public. As in *Warshawsky*, this conduct was targeted at neutral employees.[6] While the Union did not approach employees as they entered the jobsite, it did display banners aimed *solely at the neutral employer* announcing a labor dispute. In *Warshawsky*, the union only mentioned the primary employer in its communications. The majority ignores this telling fact, which makes an even more compelling case than in *Warshawsky* for the inference of unlawful inducement.

Moreover, my colleagues' effort to distinguish Warshawsky on its facts misses the larger point of the court's opinion in that case. In granting the petition for review, the court chastised the Board for employing

> a kind of "divide and conquer" evidentiary strategy, dissecting the General Counsel's case into evidentiary fragments that standing alone would be insufficient to prove inducement, but neglecting to consider what we think is the overpowering evidentiary force of those parts put together. For the Board to focus on evidentiary fragments and to ignore the aggregate weight of the evidence is no more permissible than ignoring evidence that contradicts its conclusion.

Warshawsky & Co. v. NLRB, supra, 182 F.3d at 956. Regrettably, my colleagues repeat that error in this case. The General Counsel may not have conclusively established unlawful inducement or encouragement in this case, but he was not required to do so. The standard in 8(b)(4) cases, like any other, is the preponderance of the evidence. And it may be true that elements of the Union's conduct, taken in isolation, could be susceptible to an innocent explanation. But the real question is whether this is a reasonable inference to draw viewing the evidence as a whole. *Warshawsky & Co. v. NLRB*, supra. As shown, it is not.

It is by now quite apparent that the majority is bent on undoing through administrative adjudication the restrictions imposed by Congress on unions' ability to involve neutral employers and employees in a labor dispute. Of course, they lack the authority to do so. At least in *Eliason*, the majority could assert a concern—unfounded in my view—that finding bannering to be coercive within the meaning of Section 8(b)(4)(ii)(B) would pose a potential conflict with the First Amendment. In the present case, the constitutional avoidance doctrine provides no refuge for their contortion of the meaning of Section 8(b)(4)(i)(B) to find that bannering addressed to a neutral employer and its employees at a private construction site does not induce or encourage a work stoppage in support of a secondary objective. For all of the foregoing reasons, I dissent from my colleagues' failure to enforce the Act as intended.

William J. Daly, Esq. and *Michael Cooperman, Esq.*, for the General Counsel.

Daniel M. Shanley, Esq. and *Alice Chen, Esq.*, of Los Angeles, California, for the Respondents.

[6] The court in *Warshawsky* found that the handbilling at issue there was "de facto directed only at the neutral employees" even though the handbillers were stationed on "a road that was used *primarily* by persons going to and from the site" and the evidence did not affirmatively show that no other persons could have received the handbills. 182 F.3d at 949, 954–955 (emphasis added). Thus, it is of no moment that, in the instant case, members of the public traveling by automobile on roads located some distance away from the neutral gates at which the banners were stationed theoretically could have viewed the banners at issue here. At least until today's decision, the Board has never required that union conduct be viewable only by neutral employees, and invisible to the public at large, before a violation of Sec. 8(b)(4)(i)(B) will be found.

John S. Chindlund, Esq. and *Thomas R. Barton, Esq.*, of Salt Lake City, Utah, for New Star General Contractors, Inc. and Okland Construction Co., Inc.

Patrick Scully, Esq., of Denver, Colorida, for East – West Partners – Denver, Inc.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Salt Lake City, Utah, from September 14 through 17, 2004. This case was tried following the issuance of an amended order consolidating cases, consolidated complaint and notice of hearing (the complaint) by the Regional Director for Region 27 of the National Labor Relations Board (the Board) on September 9, 2004. (GC Exh. 1(yyy).) The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by New Star General Contractors, Inc. (New Star), East – West Partners – Denver, Inc. (East—West), Terry Staples, an individual (Staples), and Okland Construction Co., Inc. (Okland) (collectively the Charging Parties), against Southwest Regional Council of Carpenters (the Regional Council) and United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498 (Locals 184 and 1498) (all three collectively referred to as the Respondents).[1] It alleges that the Respondents violated Section 8(b)(4)(i)(B) and (ii)(B) of the National Labor Relations Act (the Act).[2] The Respondents filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties were given notice of the hearing, and counsel for the General Counsel, counsel for the Respondents, counsel for New Star and Okland, and counsel for East—West made appearances. I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondents, and counsel for New Star and Okland, and my observation of the demeanor of the witnesses,[3] I now make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint as amended at the hearing[4] alleges that certain entities are employers and/or persons as defined in the Act. The Respondents' answer as amended at the hearing admits those allegations as are set forth in complaint paragraphs 2 and 3. Therefore, based on those allegations, admissions, and the undisputed evidence, I conclude the following:

New Star is a corporation, with an office and place of business in Salt Lake City, Utah, where it has been engaged in the construction industry as a general contractor and contractor. In the course and conduct of its business operations, New Star annually purchases and receives at its Utah facilities goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Utah. Further, New Star, in the course and conduct of its business operations, annually sells and ships from its Utah facilities goods, materials, and services valued in excess of $50,000 directly to points and places outside the State of Utah. Accordingly, New Star is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7), and Section 8(b)(4) of the Act.

Okland is a corporation, with an office and place of business in Salt Lake City, Utah, where it has been engaged in the construction industry as a general contractor and contractor. In the course and conduct of its business operations, Okland annually purchases and receives at its Utah facilities goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Utah. Further, Okland, in the course and conduct of its business operations, annually sells and ships from its Utah facilities goods, materials, and services valued in excess of $50,000 directly to points and places outside the State of Utah. Accordingly, Okland is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7), and Section 8(b)(4) of the Act.

Utah Transit Authority, a subdivision of the State of Utah, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

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[1] In his amended answer to the complaint, counsel for the Respondents admits the filing of the various charges and service on the Respondents as specifically alleged in par. 1 of the complaint. (R. Exh. 1.)

[2] At the conclusion of the trial, I granted the General Counsel's oral motion, over the Respondents' objection, to amend the complaint to allege that the Regional Council was responsible, along with Locals 184 and 1498, for the commission of unfair labor practices at each site where the complaint alleges violations of the Act occurred. The amendment was closely related to existing allegations, and arose from the same facts and legal theory. *Payless Drug Stores*, 313 NLRB 1220 (1994). Further, the Respondents were not prejudiced by the amendment as counsel, although offered the opportunity, specifically did not request a continuance to prepare a rebuttal, and the additional allegations were fully litigated at the hearing. *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992).

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[4] The complaint was amended a number of times during the course of the hearing to add allegations, delete allegations, and make other changes. The answer was also amended to make admissions and denials. All references to the complaint or answer are as finally amended. Similarly, I hereby grant the General Counsel's unopposed Motion to Amend Formal Papers dated October 8, intended to correct certain inadvertent omissions. The motion is admitted into evidence as GC Exh. 83, and the formal papers are amended and renumbered as is reflected in that motion.

Jacobsen Construction Co., Inc., a construction general contractor, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), (7) and Section 8(b)(4) of the Act.

Research Park Associates, Inc., a company that owns and manages property, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Raintree Resorts, a company that owns and manages real estate, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b) (4) of the Act.

Prudential Utah Real Estate, a company that provides residential and commercial real estate services, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Ironwood Partners of Utah LLC, a real estate developer, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Premier Resorts, a real estate management company, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Deer Valley Lodging, a real estate management company, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Silver Lake Developers, a company that owns and develops real estate, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Black Diamond Condominium Homeowners Association, an association of homeowners, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

East – West Partners, Inc., a real estate developer, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

East – West Denver, a real estate developer, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Staples, a real estate developer, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Matterhorn Development LLC, a real estate developer, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Stampin' Up, a manufacturer and distributor of decorative stamps, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

On-Point Properties, LLC, a real estate developer, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Perry Olsen Drywall, a construction contractor, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Masonomics, Inc., a construction contractor, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Exclusive Resorts, a private residence vacation club, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Paul Snyder Masonry is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Biaggi's Ristorante, a restaurant, is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Brigham Young University is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

The University of Utah is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

America First Federal Credit Union is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

NPS Pharmaceutical, Inc., is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Resorts West is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

Ryan Company is now, and has been at all material times, a person engaged in commerce or an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

II. LABOR ORGANIZATIONS

The complaint alleges, the answer admits, and I find that at all times material, the three Respondents (the Regional Council, Local 184 and Local 1498) have each been separate labor organizations within the meaning of Section 2(5) of the Act.

III. BACKGROUND FACTS

For the most part, the facts in this case are not disputed. At the hearing, the parties entered into a series of oral stipulations of fact. Also, much of the evidence offered by the General Counsel was simply unrebutted by the Respondents. Accordingly, the background facts as set forth below are not in dispute.

Certain of the Respondents' members have been on strike against New Star since April 26, 2004,[5] and on strike against Okland since May 26.[6] With regard to the other entities named in the complaint as persons engaged in commerce, except for Perry Olsen Drywall, the Respondents do not represent any of those entities' employees; have no collective-bargaining agreements with any of those entities; have made no demand for recognition with regard to representation of those entities' employees; and have no dispute as to the terms and conditions of employment of those entities' employees.

In furtherance of their strike and labor dispute against New Star and Okland, the Respondents[7] have periodically placed individuals holding banners, usually possessing handbills, and sometimes distributing those handbills, at various locations, primarily in the greater Salt Lake City, Park City, and Provo, Utah, and Denver, Colorado metropolitan areas. The "bannering," as alleged in the complaint, occurred at 19 separate locations. With regard to the bannering, the parties stipulated that there was no blocking of ingress and egress, and no violence associated with it. At each location where bannering occurred, for the most part, the banners were stationary each day, although the banners may have been moved from day to day. In any event, there was clearly no patrolling back and forth with the banners.

Generally, when bannering occurred, there were handbills/leaflets available at the location. However, the frequency with which handbills were distributed and to whom they were distributed varied greatly from location to location, and apparently depended principally on the subjective desire of those persons manning the banners.

All the banners are the same dimensions, specifically 4 feet tall by 20 feet long. The banners are framed by semi-rigid pipe, likely PVC. The numbers of individuals manning the banners at the various locations varied anywhere from two to five, with three being the most common number. All the banners are similarly worded. In the middle of the banners, in large capital letters, colored red, appear the words, "SHAME ON" followed by the name of one of the entities listed in the complaint, also written in large capital red letters. In both the right and left upper corners of the banners, written in somewhat smaller black capital letters appear the words, "LABOR DISPUTE." (GC Exhs. 5, 8, 12, 15, 26, 30, 37, 44, 47, 55, 68, and 82.)

The handbills/leaflets are all similarly worded. At the top of the handbills in large capital letters appear the words "SHAME ON," followed by the name of the particular entity that is also named on the accompanying banner. Next appear the words, "For Desecration of the American Way of Life." There then appears a drawing of a large rat inside a house, gnawing on an American Flag. The handbills are fairly detailed, accusing the entity named on the banner of "profiting from unfair labor practices." The handbill mentions either New Star or Okland, and explains the nature of the dispute that the Respondents have with these employers. Further, the handbills set forth a connection between either New Star or Okland and the entity named on the banner. According to the handbill, businesses and individuals have an "obligation to monitor" those "companies whose services or products they consume, either directly or indirectly." These entities "must use their managerial discretion" to prevent "lawbreaking companies" from profiting from their projects. Finally, the handbill asks that people do the following: "PLEASE TELL [the name of the entity on the banner] THAT YOU WANT THEM TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT LAW-BREAKING COMPANIES NOT BE ALLOWED TO HAVE ANY PART IN ANY PROJECT IN WHICH THEY MAY BE INVOLVED." This is followed by the name of Local 184 and Local 1498, as well as a telephone number to call for further information. At the very end of the handbill, in small capital letters it says, "WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS." (GC. Exhs. 3, 10, 22, 24, 29, 31, 46, and 57.)

It appears that at virtually every bannering site, the persons manning the banners possessed corresponding handbills/leaflets. However, the distribution of the handbills varied greatly from location to location. At some sites, the persons manning the banners affirmatively offered the handbills to pedestrians and motorists, and in some instances even waved them at passing cars. At some other sites, relatively few handbills were offered to passers-by. However, it appears that the most common practice was for the persons manning the banners to distribute handbills only when people asked them questions concerning what the bannering was all about. For the most part, the persons manning the banners did not directly answer such questions, except to give out a handbill and suggest that further information could be obtained by calling the number on the handbill.

The persons manning the banners almost always positioned the banners on the public sidewalk, with the lettering facing toward the public street or walkway. The framed banners did not have legs, and were not self-supporting. For the most part, the persons manning the banners would stand and hold them in place, or at a minimum, they would be seated with the banners leaning against their bodies. There is no indication that the banners were ever left unattended. Generally, the bannering took place Monday thru Friday, from 9 a.m. to 3 p.m. The dates for the bannering at the various locations varied, with the earliest occurring in late April, some starting and stopping, and with a limited number still continuing as late as the time of the hearing in mid-September.

[5] All dates are in 2004, unless otherwise indicated.

[6] The Unions have also filed charges with the Board against New Star and Okland, alleging various unfair labor practices, including an alleged violation of Sec. 8(a)(2) of the Act.

[7] The use of the term Respondents is intended to include all three labor organizations. As will be explained in detail later in this decision, I find that the Regional Council is jointly responsible with the two locals for every location where "bannering" activity occurred, as alleged in the complaint.

Before the bannering began at any specific location, the Respondents sent a letter to the entity subsequently named on the banner. These letters were all very similar, and were sent on behalf of the two locals. Each letter was encaptioned "NOTICE OF LABOR DISPUTE AND UNFAIR LABOR PRACTICE STRIKE," and made mention of the locals strike and labor dispute against either New Star or Okland. The letter went on to state that the locals "intend to exercise their rights under the National Labor Relations Act and the First Amendment to protest and publicize" the nature of the dispute. Further, the letter indicated the Respondents' position that "business and individuals" have an obligation to monitor "the kind of companies whose services or products they consume, both directly and indirectly." According to the letter, these entities "must use their managerial discretion to insist that lawbreaking companies not be allowed to have any part in any of their projects." The Respondents informed the addressee that the locals would be "extending their protest activities to all parties associated with any project where [Okland or New Star] may be employed," and that these activities "will not be restricted to job sites alone," but will include "the businesses and places of work of those [entities] who benefit, directly or indirectly, from the use of [Okland or New Star]. These activities will include lawful picketing and demonstration activity, highly visible banner displays, and handbill distribution." The addressee was asked to determine whether New Star or Okland had any connection with its projects, and, if so, to "use all your lawful influence to exclude [New Star or Okland] from those projects" until it ceased and made amends for the improper conduct. The telephone number for Local 184 was given in the event the addressee had any questions. (GC Exh. 2.)

It is important to note that the General Counsel specifically stipulated with the other parties that there was no contention that either the prebannering letters addressed to the entities named on the banners, or the handbills distributed with the bannering constituted separate, independent violations of the Act.

A. The Issues

The parties view the Respondents' bannering activity very differently. It is the position of counsel for the General Counsel that the Respondents' bannering activity constitutes "picketing," and in addition constitutes "misleading and fraudulent speech." According to the General Counsel, in displaying its banners at some 19 locations, the Respondents were engaged in a "secondary boycott" by attempting to enmesh "neutrals" in its dispute with New Star and Okland in violation of Section 8(b)(4) of the Act.

In the view of the General Counsel, the Respondents are engaged in a "primary labor dispute" with New Star and Oakland. The General Counsel contends that the other persons or employers named in the complaint are secondaries or neutrals, which have no genuine labor dispute with the Respondents. It was to those neutrals that the Respondents sent the prebannering letters, indicating the Respondents' intent to engage in protest activities, and to extend those protest activities to all parties associated with any project where New Star or Okland had some involvement. The letters indicated that the protest activities would include banner displays and handbill distribution, and would take place at jobsites, businesses, and places of work of those entities that benefited directly or indirectly from the use of New Star or Okland. Further, the letters asked the addressees to use their influence to exclude New Star or Okland from their projects. (GC Exh. 2.) It is the contention of the General Counsel that the letters demonstrate that an "object" of the Respondents' bannering activity was to cause the entities to "cease doing business with" New Star, Okland, or each other.

It is the position of the General Counsel that the Respondents' bannering activity at the 19 locations in Utah and Colorado near the facilities of neutral employers or persons was a violation of Section 8(b)(4)(ii)(B) of the Act, as it constituted conduct intended "to threaten, coerce, or restrain" the neutrals with an object of forcing them to cease doing business with New Star, Okland, or each other. Further, the General Counsel contends that two of those locations were "common situs job sites," and that the Respondents established their banners in close proximity to gates reserved for neutral employers and their employees. This conduct the General Counsel alleges was an effort by the Respondents to "induce or encourage" employees to engage in a strike against their employer in violation of Section 8(b)(4)(i)(B) of the Act.

Further, as part of its theory that the Respondents were engaged in conduct with an unlawful object, the General Counsel argues that in reality, the bannering was nothing less than picketing. The General Counsel stresses the large size of the banners, and the fact that two to four agents of the Respondents accompanied them. The General Counsel also contends that an alleged unlawful object is demonstrated by the "misleading, false, and defamatory" wording on the banners. The language on the banners to which the General Counsel objects is the naming of only neutral employers or persons, with no reference to the primary employer, namely New Star or Okland. The General Counsel also objects to the words "labor dispute," which he contends falsely advises the reader of the banner of a labor dispute between the Respondents and the entity named on the banner. Central to the General Counsel's theory in this case is his argument that there is no genuine labor dispute between the Respondents and any of the employers or persons named on the banners. All of which, the General Counsel contends establishes the Respondents' unlawful object in violation of the Act.

Predictably, the Respondents have a dramatically different view of the bannering. According to counsel for the Respondents, bannering is not picketing, and on its face is not coercive within the meaning of the Act. Counsel stresses that it is unrebutted that the bannering in question in this case was peaceful, and that the banners were stationary, with no patrolling, and no movement other than the placement of the banners. The banners were displayed on the public sidewalk, and there was no blockage of ingress or egress of the business or project being bannered. There was no allegation of violence, and banner holders did not shout, but merely offered handbills to passers-by, or to those individuals who inquired as to the nature of the dispute.

Counsel for the Respondents argues that the First Amendment to the United States Constitution protects the right to engage in bannering, which counsel claims is a form of speech. According to counsel, Section 8(b)(4) of the Act prohibits coer-

cive, threatening, or restraining conduct, which has a secondary object. Speech, on the other hand, cannot be construed to threaten, coerce, or restrain for a secondary object within the meaning of the Act, without running afoul of the First Amendment prohibition against abridging the freedom of speech.

According to counsel, picketing can be regulated under the Act, because it is considered by the courts and the Board to constitute a mixture of conduct and speech. Counsel for the Respondents distinguishes between a picket line, which typically involves individuals patrolling with signs, and a stationary banner. He argues that a picket line by its very physical presence is designed to keep people away, like a fence, and, thus, may be considered coercive. A banner is allegedly only a written message, with no element of conduct. Therefore, the Government cannot restrict a peaceful message.

Counsel further argues that the legislative history of Section 8(b)(4) establishes that the law was designed to allow people to engage in "publicity, other than picketing, for the purpose of truthfully advising the public," of the existence of a labor dispute. (See the third proviso to Sec. 8(b)(4) of the Act.) Concomitantly, he argues that the language on the banners in question constitutes the truthful advertisement of a labor dispute between the Respondents and those entities named on the banners. It is counsel's contention that the definition of a "labor dispute" in Section 2(9) of the Act[8] is broad enough to cover the nature of the dispute between the Respondents and the entities named on the banners, such that the message was on its face truthful.

Finally, it is the Respondents' position that the General Counsel's theory of the case, namely that the bannering was a violation of the Act, would raise serious Constitutional problems related to free speech. Counsel for the Respondents argues that under such circumstances, the Board should construe the statute with a view to avoiding such problems, unless such construction is plainly contrary to the intent of Congress. Of course, counsel further contends that his view that the bannering constitutes permissible speech is in total conformity with the intent of Congress, as it is specifically provided for in the "publicity proviso" to Section 8(b)(4) of the Act.

B. Responsibility for the Bannering

In his pleadings, counsel for the Respondents admitted that Locals 184 and 1498 were responsible for the bannering activity at each site named in the complaint. Further, he admitted joint liability for the Regional Council at three specific locations alleged in the complaint. However, as I have noted above, at the hearing I permitted counsel for the General Counsel to amend the complaint to allege joint liability for the Regional Council for the bannering activity at all the sites named in the complaint. I granted this amendment, over the Respondents' objection, for the reasons expressed earlier. Counsel for the Respondents continues in his posthearing brief to deny the joint liability of the Regional Council for the addition locations.

Based on the undisputed evidence offered at the hearing, it is clear that the Regional Council is jointly responsible with Locals 184 and 1498 for the bannering activity at each and every location alleged in the complaint. Counsel for the Respondents called as his only witness Patrick Stewart, a special representative of the Regional Council. Stewart testified that he is currently "working for Local 184 and 1498 in regard to the banners," although his salary continues to be paid for by the Regional Council. Further, he testified, "I work with the language on the banner, and I also work with the handbills to make sure the appropriate handbills go with the appropriate banners."

According to Stewart, since the commencement of the strike against New Star and Okland, he has been present in Utah off and on for a total of approximately 5 weeks. During the same period of time, at least six other special representatives of the Regional Council have also been present in Utah to assist in the campaign against New Star and Okland. Stewart admitted that he was responsible for getting the banners created, the handbills printed, and for their distribution to the various sites. Perhaps most significant, Stewart acknowledged that he was responsible for ensuring that the persons manning the banners at each location were instructed as to how the bannering was to be conducted. Those instructions came through him, and it is clear from his testimony that Stewart was relying on his experience with similar bannering activities in California and Arizona to advise the banner holders in this dispute. Further, a manager of one of the entities being bannered testified that at one point he was directly involved in a telephone conversation with Stewart about what that entity needed to do in order for the Respondents to cease their bannering activity.[9] Stewart did not deny this conversation.

Stewart also testified that one of the other special representatives of the Regional Council who was assisting with the bannering activities was Bruce Bachman. Earlier, several witnesses[10] for the General Counsel had testified that when they complained about the bannering activity at sites where they were employed, Bachman appeared to discuss the matter with them, and offered them his business card. The card indicates that Bachman is a special representative of the Regional Council. (GC Exhs. 38, 67.)

Following Stewart's testimony, it is obvious that the Regional Council was intimately involved with the two locals in organizing and coordinating the bannering and handbilling, and instructing the persons manning the banners as to how they should conduct themselves. This was true at all the locations named in the complaint. Clearly, the Regional Council was acting in concert with the two locals regarding the bannering activity. Further, the presence of Bachman at several bannering sites, where he answered questions from management representatives and identified himself as a "special representative" of the Regional Council, establishes that he was holding himself out to others as an agent of the Regional Council.[11]

[8] In pertinent part, Sec. 2(9) of the Act states, "The term 'labor dispute' includes any controversy concerning terms, tenure, or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee."

[9] The testimony about this conversation came from Les Carriel, manager for Deer Valley Lodging/Premier Resorts of Utah.

[10] Blake Weathers and Scott Greenstreet

[11] The Board applies the common law principles of agency when determining whether an employee is acting with either actual or apparent

Accordingly, I conclude that the Regional Council is jointly responsible with Locals 184 and 1498 for the bannering activity that occurred at each and every location named in the complaint. The Regional Council certainly had knowledge of that activity, participated in it, and clearly did not disavow it. The three Respondents are jointly liable for the conduct at all the bannering sites specified in the complaint.[12]

C. The Locations where Bannering Occurred

There is almost no dispute as to what transpired at each of the 19 sites where bannering occurred, as alleged in the complaint. However, I feel it necessary to at least in summary fashion set forth the basic facts of what occurred at each location.

1. Utah Transit Authority

Utah Transit Authority (UTA) is engaged in providing public transportation services in Salt Lake and five adjoining counties. UTA hired Jacobsen Construction Co., Inc. (Jacobsen) to perform construction work on a building at UTA's rail service center located in Midvale, Utah. On about January 26, Jacobsen hired New Star as a subcontractor on this project. New Star was primarily engaged as a concrete subcontractor on the project. New Star was still engaged on the project at the commencement of the strike on April 26, and its work there continued until about August 6.

On about May 24, Locals 184 and 1498 sent two "Notice of Labor Dispute" letters to Jacobsen. (GC Exh. 2.)[13] Sometime that same month, the Respondents established, and have since maintained, a banner in front of UTA's administrative offices in Salt Lake City, Utah. The banner has usually been held by two to three agents of the Respondents, and has been displayed on weekdays from about 9 a.m. to about 3 p.m.[14] The only entity named on the banner was the Utah Transit Authority.

The banner has been displayed on a grass median area at the front of the administrative office building. It is located approximately 20–25 feet from the entrance to the UTA parking lot and approximately 120 feet from the entrance to the office building itself. The banner has always been displayed at this same location, and is visible to anyone entering the facility through the main entryway. (GC Exh. 40.)

In conjunction with the display of the banner, handbills have been distributed to passers-by who approach the people manning the banner. The handbills name UTA and explain that Locals 184 and 1498 have a dispute with New Star. (GC Exh. 3.)[15]

New Star completed its work on the UTA rail service center on about August 6. However, as of the date of the hearing, the banner was still being displayed at UTA's administrative offices. New Star has not performed any work at the UTA administrative offices during the period of time that the banner has been displayed there.

2. Research Park Associates

Research Park Associates, Inc. (RPA) develops research related facilities in university research parks, and it also manages property. RPA owns and manages certain office buildings in Salt Lake City, Utah, in an area called Research Park. RPA had engaged New Star as the general contractor on a remodeling project at one of its buildings located on Komas Drive, Salt Lake City, Utah. New Star was still engaged on this project at the commencement of the strike on April 26, and its work there continued until about May 28. RPA also owns an office building at 421 Wakara Way, Salt Lake City, and leases all of the space to tenants. This building is part of an interconnected three-building complex that includes buildings located at 419 and 423 Wakara Way. (GC Exh. 9.) RPA manages these buildings and has its office at the building at 423 Wakara Way. Fourteen tenants occupy space in the office complex.

On about May 4, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to RPA notifying it of their dispute with New Star and their intention to engage in "protest activities." On that same day, the Respondents established a banner outside the building located at 421 Wakara Way, Salt Lake City, Utah, which banner named Research Park Associates. The banner has been primarily located on a grassy area between the building and Wakara Way. It is located within approximately 20–30 feet of the driveway that leads from Wakara Way to the parking lot for the three-building complex.[16] The entry door is approximately 225–300 feet from the location of the banner. However, the banner is clearly visible to individuals who enter the parking lot from Wakara Way. (GC Exhs. 8, 9.)

There are usually three people stationed with the banner. They have handbills available for distribution, upon request, which name New Star and RPA and explain the nature of the dispute. New Star completed its work on the 585 Komas Building on about May 28. New Star has not performed any work on the buildings at the three-building complex on Wakara Way during the time that the banner has been displayed. However, as of the time of the hearing, the banner was still being displayed at this location.

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authority on behalf of an employer when that employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). At several sites, Bachman distributed business cards to management officials that identified him as a "special representative" of the Regional Council, and he spoke on behalf of the Respondents. This establishes that he possessed both actual and apparent authority on behalf of the Regional Council, at least as relates to the Respondents' bannering activity at those particular locations. See, e.g., *Longshoremen Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487, 1507–1508 (1948); *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001).

[12] Contrary to the position taken by counsel for the Respondents in his posthearing brief, it is not necessary to establish an agency relationship between the three Respondents. It is adequate to simply establish that the three Unions were acting in concert, and were each jointly liable for the bannering activity at every location alleged.

[13] These "Notice of Labor Dispute" letters were described in detail earlier in this decision.

[14] As the parties stipulated that the banners were generally displayed at these times and days, I will not note them further. The times and days will, hereafter, only be mentioned if they differ from the stipulation. Similarly, the language on the banners, size, shape, and color was stipulated to by the parties, and set forth above. It will not be further noted, unless the need arises.

[15] The handbills were described in detail earlier in this decision.

[16] During periods when the lawn sprinklers are on or the lawn is being mowed, once or twice a week, the banner has been displayed on the opposite side of the driveway, approximately 30 feet from the driveway.

3. Prudential Utah Real Estate–Main Street office

Ironwood Partners of Utah, LLC (Ironwood Partners) is a real estate development firm engaged in the construction of Ironwood condominiums near Park City, Utah. At the commencement of the strike, New Star was engaged by Ironwood Partners as the general contractor on the Ironwood condominium project. As of the time of the hearing, New Star's work was ongoing.

Prudential Utah Real Estate (Prudential) is a real estate agent and broker with several offices in Park City, Utah, including its Main Street office, its Saddleview office, and its Pinebrook office. Prudential is a party to an agreement with Ironwood Partners to serve as the listing agent for the Ironwood condominiums.

Prudential's Main Street office is located at the corner of Main Street and Heber Avenue. There are two other tenants in the building, and all persons entering the building may use the same entrance.

On April 27, the Respondents sent a "Notice of Labor Dispute" letter to Prudential. From on about April 26, until on about May 13, the Respondents maintained a banner outside of Prudential's Main Street office. The banner was located on the sidewalk immediately in front of Prudential's building and was about 12–13 feet from the front door of the building. It was clearly visible to anyone wanting to enter Prudential's offices. The banner named Ironwood Partners.

There were usually between two to four people stationed with the banner. The people manning the banner had handbills available for distribution. However, the only witness to testify about this location indicated that she had never seen any of the handbills being passed out.[17] The handbills named New Star, Ironwood Partners, and Prudential, and explained the nature of the dispute. (GC Exh. 46.)

It is undisputed that while Prudential is the listing agent for Ironwood condominiums, it has no direct business relationship with New Star.

4. Prudential Utah Real Estate–Saddleview office

Prudential's Saddleview office is located on Park Avenue, Park City, Utah, in a four-building commercial office complex near the intersection of Park Avenue and Saddleview Drive. Prudential occupies space in three of the four buildings in the complex.

On about the beginning of May, the Respondents established a banner outside of the Saddleview office at the intersection of Park and Saddleview. (GC Exh. 47.) The banner was located on a grassy area near the intersection, and it was approximately 100 feet from the entrance to the parking area of the office complex off of Saddleview Drive. The driveway entrance off of Saddleview Drive is the main entrance to the parking area of the office complex, and it is the one generally used by Prudential's clients. The banner was clearly visible to anyone entering Saddleview Drive from Park Avenue. The banner was approximately 50 feet from the buildings of the complex. (GC Exh. 48.)

The banner was displayed at this location from the beginning of May until about the beginning of August. It was usually held by two or three individuals. The banner named Prudential Real Estate. The only witness who testified about this location indicated that she never saw any handbills being distributed by the people manning the banner.[18]

As was noted above, it is undisputed that Prudential has no direct business relationship with New Star.

5. Prudential Utah Real Estate–Pinebrook office

Pudential's Pinebrook office is located on Pinebrook Road, Park City, Utah. It is near the intersection of Pinebrook Road and Kilby Road, which is the frontage road just south of I-80 at exit 143. The office consists of two buildings both of which are occupied exclusively by Prudential. The entrance to the parking area of the Prudential offices is off of Pinebrook Road and is about 30 feet from the intersection. (GC Exh. 50.)

On about May 24, the Respondents established a banner near the Pinebrook office. It named Prudential Real Estate. The banner faces Kilby Road. For about 60 days starting May 24, the banner was displayed at one of two locations, which were about 20–25 feet and about 40 feet, respectively, from the intersection of Kilby Road and Pinebrook Road. For the period of approximately 30 days before the hearing, the banner was displayed at a location about 60 feet from the intersection. In any event, at all three locations, the banner was clearly visible to anyone passing on the frontage road and would be clearly visible to anyone approaching the Prudential office from Salt Lake City. From Kilby Road, the banner would be visible at all three locations, and visible from I-80 at its last location.

Two or three individuals usually held the banner. The one witness who testified about the Pinebrook location indicated that he had never observed any of the people manning the banner distributing handbills.[19]

6. East-West Partners, Inc.

East-West Partners, Inc. (East-West Partners) is a real estate developer with its headquarters in Beaver Creek, Colorado. It operates in various States through separate divisions or offices, each of which is a separate legal entity, including East-West Partners–Utah and East-West Partners–Denver. Bernie Niznik, a vice president of construction for East-West Partners–Denver, testified that all the East-West Partners divisions are interrelated, and that the parent company, East-West Partners, Inc. owns 100 percent of East-West Partners–Denver.[20]

East-West Partners is engaged in the construction of two projects near Park City, Utah, through a company called Empire Mountain Village, LLC. Since April 5, New Star has been engaged, pursuant to a contract with Empire Mountain Village, LLC, as the general contractor on the construction of the two projects.

East-West Partners–Denver, Inc. (East-West Denver) is a real estate developer with an office located at 1610 Little Raven, Denver, Colorado. East-West Denver has no direct involve-

[17] Kimberly Vega, Prudential's chief administrator.

[18] Chris Robertson, Prudential's Saddleview office branch broker.

[19] Court Klekas, Prudential's Pinebrook office branch broker.

[20] Presumably, the parent company also owns at least some percentage of East-West Partners–Utah.

ment in the construction of the two projects near Park City, Utah regarding which New Star is serving as general contractor. (Although, as I have noted, the East-West Partners divisions are interrelated, with the parent company owning an interest in the divisions.)

On about April 27, Locals 184 and 1498 sent two "Notice of Labor Dispute" letters to East-West Partners. (GC Exh. 2.) On about May 21, the Respondents established a banner outside of the Park Place Lofts building, which houses the offices of East-West Denver. At this location, the banner was on the public sidewalk approximately 50 feet from the main entrance to the building used by East-West Denver and its customers. It was also approximately 20 feet from the entrance to Zengo, a restaurant owned by East-West Denver. At this location, the banner was visible from the entrance to the building. The banner remained in this location for approximately 2-1/2 weeks, after which it was moved to a plaza location approximately 40 feet from its original location. (GC Exhs. 4, 6, designated as "Banner Location #2.") At this second location, the banner was approximately 90 feet from the building entrance and about 60 feet from the entrance to Zengo. The banner remained visible from the entrance to the building used by East-West Denver and its customers. After 1 day, the banner was relocated to a spot approximately 20 feet from its original location. (GC Exh. 6, designated by "Banner Location #3.") At this location, the banner was approximately 70 feet from the building entrance and about 18 feet from the entrance to Zengo. The banner remained at this location until on about August 10 or 11.

The banner, which has been held up by between three and five individuals, names East-West Partners. The banner holders have also handed out handbills explaining the nature of the dispute, and mentioning East-West Partners and New Star. (GC Exh. 3.)

7. Terry Staples

As noted earlier, Ironwood Partners is a real estate development firm engaged in the construction of the Ironwood condominiums near Park City, Utah. At the commencement of the strike against New Star on about April 26, New Star was engaged by Ironwood Partners as the general contractor on the Ironwood condominium project. At the time of the hearing, New Star's work on the project was continuing.

Terry Staples is a real estate developer whose office and place of business is located on St. Paul Street, Denver, Colorado. The building also houses various other tenants. Staples made a personal investment in the Ironwood condominium project of $50,000, which represented approximately eight-tenths of 1 percent of the total investment in the project. He has had no planning or decisionmaking function with the project since about April 2002. He has had no current or past direct relationship with New Star.

On April 27, Locals 184 and 1498 mailed a "Notice of Labor Dispute" letter to Staples' office address. (GC Exh. 2.) From about the last week of May until about June 28, the Respondents established a banner on the sidewalk in front of Staples' office building, approximately 8 feet from the entrance. The banner faced St. Paul Street and was about 30 to 40 feet from the intersection of St. Paul and Second Avenue. It was visible from both St. Paul Street and Second Avenue.

Two to five people manned the banner, and it named Staples/Ironwood. The banner holders had handbills available for distribution upon request. Terry Staples testified that he asked for a handbill and was given one. Otherwise, he did not view any handbills being distributed. The handbills named Staples/Ironwood and New Star, and explained the nature of the dispute. (GC Exh. 24.)

Terry Staples testified that as a result of the banner display, he received negative reactions from the public, in the form of anonymous messages left with his answering service, and was told by his landlord that other tenants were complaining about the adverse affect on their businesses caused by the banner.[21]

8. Zermatt Resort & Spa

Matterhorn Development, LLC (Matterhorn) is a real estate developer engaged in the construction of the Zermatt Resort & Spa located on West Resort Road, Midway, Utah. The project consists of the construction of a hotel, condominiums, and an exhibition building. Since about February 11, 2002, Okland has been engaged, pursuant to a contract with Matterhorn, as the general contractor on the project.

The Zermatt project is fenced and, since at least the beginning of June, there has been two gates established at the project. One gate, located on North Homestead Drive, is the Okland gate. The second gate is used by subcontractors to enter the jobsite. (GC Exh. 71.)[22]

On about May 19, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to Robert Fuller, a principal of Matterhorn. (GC Exh. 2.) At the beginning of June, the Respondents established a banner near the Okland gate. The banner named Zermatt Resort & Spa. Handbills were present with the banner. The handbills named Zermatt Resort & Spa and Okland, and explained the nature of the dispute. (GC Exh. 3.) The banner remained at this location for the entire period the Respondents engaged in bannering activity with the exception of approximately a 3-hour period on June 24. On that date at approximately 10 a.m., the Respondents moved the banner to a location directly across the street from the Zermett sales office trailer. The banner was located about 30 feet from the sales trailer. It remained at that location until about 1 p.m., when it was moved back to the Okland gate.

During the time that the banner was located near the sales office, there were three individuals manning the banner, and another two individuals identified as being affiliated with the Respondents standing nearby. A witness testified that during

[21] At the hearing, I reserved ruling on an objection from counsel for the Respondents that such testimony reporting on the reaction by third parties to the bannering was inadmissible as hearsay. I now conclude that such testimony does not constitute hearsay, as it is not being offered for the truth of the matter asserted, namely the complaints themselves, but rather to show the reaction of third parties, and the impact of that reaction on the managers or principals of the neutrals. Accordingly, I will admit this testimony into evidence.

[22] Although it appears that this is a common situs construction project with a reserve gate system, the General Counsel does not allege in either the complaint or in his posthearing brief any violation of Sec. 8(b)(4)(i)(B) of the Act at this location.

the time that the banner was displayed near the sales office, he did not see any handbills being distributed.[23]

9. Black Diamond/Premier Resorts

Silver Lake Developers, a company that owns and develops real estate, has been engaged in the construction and development of the Black Diamond condominium project near Park City, Utah. Beginning in about May 2002, New Star was engaged pursuant to a contract with Silver Lake Developers as a subcontractor on the Black Diamond project. New Star completed is work on this project in March 2003.

Premier Resorts is a property management company. Premier Resorts of Utah, a property management company, is a wholly owned subsidiary of Premier Resorts. Premier Resorts of Utah does business as Deer Valley Lodging, also a property management company. Both Premier Resorts and Deer Valley Lodging maintain offices at 1375 Deer Valley Drive in Park City, Utah. Deer Valley Lodging manages the Black Diamond condominiums pursuant to a relationship with the Black Diamond homeowners association. Premier Resorts has no similar relationship with the Black Diamond homeowner association. Neither Deer Valley Lodging nor Premier Resorts has any direct business relationship with New Star.

On about May 13, the Respondents established a banner near the offices of Premier Resorts and Deer Valley Lodging. It remained there until about the first week of August. The banner named Black Diamond/ Premier. There are two entrances to the parking area of the building occupied by Premier and Deer Valley. The banner was located about 20 feet from one parking entrance and about 60 feet from the other parking entrance. Also, the banner was located approximately 200 feet from the main entrance to the building and about 160 feet from the north entrance to the building. (GC Exh. 52.)

There were usually three people stationed with the banner. The people manning the banner would distribute handbills if someone approached them. The handbills name Black Diamond Lodge/Premier Resorts and also New Star. In explaining the nature of the dispute, the handbills indicate that, "New Star is performing construction services for Premier Resorts Black Diamond Lodge project." That statement is somewhat inaccurate, as there is no direct business relationship between either Deer Valley Lodging or Premier Resorts and New Star. However, an argument can certainly be made, as the handbill attempts to make, that the named neutrals are benefiting from the construction work performed by New Star.

On August 16, Kim McClelland, president of Premier Resorts of Utah, sent a letter to New Star advising it that Premier had been named in its labor dispute with Locals 184 and 1498. The letter went on to advise New Star that Premier did not wish to be embroiled in this dispute and asked New Star to resolve its dispute with the Unions. Finally, the letter advised New Star that if Premier became aware that any of its clients intended to use New Star, it would advise them of the labor dispute. (GC Exh. 53.) Leslie Carriel, Deer Valley Lodging's manager of security, drafted this letter after several conversations with Patrick Stewart, a Regional Council special representative. Stewart suggested most of the language contained in the letter. Stewart also told Carriel that writing the letter would be in exchange for the removal of the banner. Carriel sent Stewart a copy of the letter signed by McClelland.

10. Exclusive Resorts

As noted earlier, Ironwood Partners is a real estate development firm engaged in the construction of the Ironweed condominiums near Park City, Utah. At the commencement of the strike against New Star on April 26, New Star was engaged by Ironwood Partners as the general contractor on the Ironwood condominium project. At the time of the hearing, New Star's work on the project was ongoing.

Exclusive Resorts is a private residence club that provides vacation homes for its members. It maintains an office and place of business located at 1530 Sixteenth Street, Denver, Colorado, on the 16th Street pedestrian mall. The building is a six-story structure that houses two restaurants on the ground floor and other tenants in addition to Exclusive Resorts.

As part of its normal business, Exclusive Resorts purchased a minimum of two units at the Ironwood project. A witness testified that the negotiations for the purchase of these units could have been completed by the end of June.[24] As of July 14, Exclusive Resorts had entered into a final and binding purchase agreement regarding these units. The closing date for the purchase of these units was August 27.

Locals 184 and 1498 sent Exclusive Resorts an undated "Notice of Labor Dispute" letter advising it of their labor dispute with New Star and stating that they intended to engage in protest activities. (GC Exh. 2.) From about the end of June until about the end of July, the Respondents established a banner outside of the building where Exclusive Resorts maintains its offices. The banner, which was usually manned by three to five individuals, was located 38 feet from the entrance to the building used by Exclusive Resorts and its customers, as well as the other tenants. The banner was located on the sidewalk and faced the 16th Street pedestrian mall. It named Exclusive Resorts.

In conjunction with the banner display, the people manning the banner also distributed handbills, which mentioned New Star and Exclusive Resorts and explained the nature of the dispute. (GC Exh. 29.) While the banner itself remained stationary, a witness testified that the individuals with the banner would move "4 or 5 feet" in each direction, as they would pass the handbills out to those people who would accept them.[25]

11. Biaggi's Ristorante

Biaggi's Ristorante (Biaggi's) is a restaurant located in the Gateway Plaza mall at Second South and Fourth West in Salt Lake City, Utah. Okland was employed by Ryan Company as a subcontractor to perform construction work at Biaggi's. Okland completed its work on the Biaggi's project on May 24.

On May 19, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to Biaggi's corporate offices advising it of the labor dispute with Okland and threatening protest activities. (GC Exh. 2.) A banner was maintained by the Respondents at Biaggi's from at least June 16, until about July 31. The banner

[23] Sean Nelson, Okland's assistant superintendent.

[24] Eva Miller, director of human resources for Exclusive Resorts.

[25] Eva Miller.

named Biaggi's Ristorante. A witness testified that he observed the banner specifically on June 16, when it was located approximately 20 feet from the front of the restaurant. However, the witness noticed that approximately 20 minutes after he first observed it, the banner had been moved to a location only 10 feet from the front door to the restaurant.[26]

There were three individuals stationed with the banner on June 16. They had handbills in a bag on the ground, which they distributed to people who came up and talked to them. The handbill named both Biaggi's Ristorante and Okland, and explained the nature of the dispute. (GC Exh. 3.)

12. Brigham Young University

Brigham Young University (BYU) is a university with a campus located in Provo, Utah. Since about April 25, 2002, Okland has been engaged, pursuant to a contract with BYU, as the general contractor on the construction of the Joseph F. Smith Building on the campus in Provo, Utah. The project is located in the middle of the BYU campus.

On about May 17 and 19, Locals 184 and 1498 sent "Notice of Labor Dispute" letters to BYU. (GC Exh. 2.) Since about mid-June, and continuing to the time of the hearing, the Respondents established a banner at the intersection of Bulldog Avenue and East Canyon Road in Provo. This intersection constitutes one of the main entrances into the campus. The banner is located on the sidewalk of East Canyon Road and faces that street. It is approximately 20 feet from the intersection. (GC Exh. 75.) The banner is visible to pedestrians and drivers on both East Canyon Road and Bulldog Avenue. The banner names Brigham Young University.

There are two to three individuals manning the banner. They have in their possession a stack of handbills. The handbills name both Brigham Young University and Okland, and explain the nature of the dispute. (GC Exh. 3.)

13. University of Utah

Since about June 23, Okland has been engaged pursuant to a contract with the University of Utah, as the general contractor on the construction of an indoor athletic practice facility at the campus in Salt Lake City, Utah.

On about June 15, Locals 184 and 1498 sent two "Notice of Labor Dispute" letters to the University of Utah advising it of their labor dispute with Okland and threatening protest activities. (GC Exh. 2.) Since on about July 8, and continuing, the Respondents established a banner near the intersection of Foothill Boulevard and Wakara Way in Salt Lake City. (GC Exh. 14.) The banner names the University of Utah.

The intersection of Foothill and Wakara Way constitutes an entrance into the University of Utah property.[27] The banner was located approximately 20 to 30 yards from this intersection. (GC Exh. 43.) There is no sidewalk near the banner location and there is no vehicular parking where the banner is located. Foothill is a six-lane road and is a high traffic area.

The individuals stationed with the banner have handbills in their possession. The handbills mention the University of Utah, but, instead of mentioning Okland and the athletic practice facility, New Star and the project in Research Park are mention. (GC Exh. 3.)[28]

14. America First Credit Union–Corporate campus

America First Credit Union (America First) is a financial institution that loans money and takes deposits from its members. America First has contracted with Okland to perform certain construction work. Okland built America First's data center at its corporate campus in Riverdale, Utah. It also built the Jordan Landing branch office facility. Since about June 23, Okland has been engaged as the general contractor on the construction of a branch office facility in Draper, Utah.

On May 19, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to America First advising it of their dispute with Okland and threatening protest activities. (GC Exh. 2.) Thereafter, on July 1, the Respondents established a banner in front of the operations center building at America First's corporate campus. (GC Exh. 32.) The banner named America First Credit Union.

America First's headquarters, or corporate campus, consists of several buildings including the operations center, the data center, and the commercial center. In addition, one of America First's buildings on the campus is leased to Federal Express. The America First campus is located in a rural area, and it sits on land between two freeways, I-15 and I-84.

The banner established by the Respondents faced Cozy Dale Road, which runs through the campus and in front of the operations center. Between the banner location and the operations center building itself is a parking lot that services employees and members who have business at the operations center and the commercial center building. The banner was located approximately 22–30 feet from the main entrance to the parking lot. Employees and members of America First seeking access to the operations center and the commercial center buildings use this main parking entrance. The banner location was approximately 260 feet from the entrance to the operations center building if measured in a straight line. It was also approximately 400 feet from the entrance to the data center, which sits across Cozy Dale Road. (GC Exh. 32.)

The banner remained at this location from about July 1 to about July 20, and then again from about July 26 until about the beginning of September. There were usually three banner handlers stationed with the banner. At times they would hold up the banner, and, according to one witness, at other times the

[26] Jeremy Evans, Okland project engineer.

[27] This area is called Research Park. There are 37 building within Research Park. Some of these buildings are owned by the University, some by private owners, and some by a research foundation that is, in turn, a wholly owned subsidiary of the University. Considerable time was taken during the hearing in considering the ownership of these buildings and of the land they are built upon. (GC Exh. 42.) Charles Evans, the University of Utah's director of Research Park and Real Property Administration, testified at length about these matters. However, the only finding that is really relevant to the matters in dispute is that the land within Research Park is the property of the University of Utah.

[28] Apparently, the Respondents were confusing the work being performed by Okland for the University on the indoor athletic practice facility, with the work that New Star had performed for Research Park Associates remodeling one of the buildings it owned in the Research Park area, which land was University property. (GC Exh. 42.)

banner was staked in the ground.[29] The people with the banner would distribute handbills when someone asked for one or when a car stopped. The handbills named Okland and America First Credit Union, and explained the nature of the dispute. (GC Exh. 31.)

Counsel for the General Counsel called as a witness Caleb Jeppsen, who works for America First at the corporate campus. He testified that he saw the banner on July 21, and apparently decided to investigate the situation. He approached one of the people manning the banner and asked what was going on. The person responded that he could not give out any information, and if Jeppsen wanted to learn about what was going on, Jeppsen should call the number on the handbill, one of which he gave to Jeppsen. Jeppsen admitted on cross-examination that in his affidavit previously given to the Board, he indicated that he got the banner handler to give him more information only by "prodding" him. However, later in his testimony Jeppsen denied using the word "prodding" when giving his affidavit, and suggested that the Board agent taking the statement had selected the word. In any event, Jeppsen testified that the banner handler said that America First had hired Okland to construct some buildings, that Okland was "breaking working laws," and that the "Carpenters Union" was "protesting" and would continue to do so until Okland "signed."[30]

15. America First Credit Union–Jordan Landing

America First's Jordan Landing Branch office is in West Jordan, Utah. The office is located in a retail and business park consisting of office buildings, dentist offices, four financial institutions, and some residential dwellings. The office is at the intersection of Jordan Landing Boulevard and Campus View Drive. (GC Exh. 33.)

As noted above, on about May 19, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to America First. (GC Exh. 2.) On about July 22, the Respondents established a banner near the Jordan Landing branch office, which banner named America First Credit Union. The banner faces Jordan Landing Boulevard and is about 35 feet from the intersection of Jordan Landing Boulevard and Campus View Drive. The banner is on a jogging path next to a pedestrian walkway. It is approximately 160 feet from the banner location to the Jordan Landing branch building entrance.

Ingress and egress to and from the Jordan Landing parking area and branch building is only off of Campus View Drive. Therefore, anyone seeking access to the branch office from the north would of necessity have to drive immediately by the banner.

There have usually been three people stationed with the banner. Blake Weathers, the Jordan Landing branch manager, testified that he had seen these people with the banner hand out only one handbill since the banner was established on July 22. As of the date of the hearing, the banner was still being maintained.

On July 22, Weathers approached the people with the banner. He asked them what they were doing and one of the banner handlers showed him a business card and told him if he had questions, he could call the number on the card. Subsequently, a man who identified himself as Bruce Bachman, a special representative with the Regional Council, appeared at Weathers' office. Bachman explained to Weathers the Respondents' position that they had a First Amendment right to protest the dispute with Oakland and America First, and that the banner would be removed if America First could get Okland to "fix the problem." Weathers expressed his opinion that what the Respondents were doing was "morally wrong," because the message on the banner was not truthful. The conversation ended with the men disagreeing.

16. NPS Pharmaceuticals

NRS Pharmaceuticals (NPS) has been engaged in the construction of an office and laboratory located at 383 Colorow Road in Salt Lake City, Utah. Since at least January 2004, Okland has been engaged, pursuant to a contract with NPS, as the general contractor on that project. On May 19, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to NPS advising it of their disputed with Okland and threatening protest activities. (GC Exh. 2.)

The construction of the NPS office and laboratory is being done at a jobsite within the Research Park Area. (GC Exh. 43.) In addition to the building being constructed, NPS currently occupies another building within Research Park on Chipeta Way. At about the end of June, the Respondents established a banner near the NPS building located at 240 Chipeta Way, Salt Lake City, Utah. The banner faces Chipeta Way and is located about 50–100 yards from the intersection of Chipeta Way and Wakara Way. (GC Exh. 43.) The banner names NPS Pharmaceutical. It is positioned about 15–20 feet from the entrance to the parking area used by the NPS personnel.

There have usually been three people stationed with the banner. These banner handlers have handbills available upon request. The handbills mention NPS Pharmaceutical and Okland, and explain the nature of the dispute. (GC Exh. 22.) The bannering continued as of the date of the hearing.

17. Resorts West

Resorts West is a resort, lodging and property management company located in Park City, Utah. It maintains its offices at 4343 North Highway 224 in Park City. Around the end of August, Resorts West entered into an agreement with the developers of the Ironwood condominium project to serve as the home-

[29] I do not accept the testimony of Caroline Twitchell, security director for America First, that the banner was occasionally staked into the ground. From the testimony of almost all other witness, and from viewing the numerous photographs, it is clear that the banners were framed with semi-rigid material, likely PVC, and did not have legs. Accordingly, the banners could be held in place, or leaned up against some objects, but could not be "staked" into the ground.

[30] I do not find Jeppsen to be a credible witness. From his demeanor when testifying on cross-examination, it was apparent that he harbored animosity toward the Respondents. Further, whether he authored the word "prodding" in his affidavit or not, it is obvious from his testimony that prodding was exactly what he did. He admitted asking the banner handler whether he was being paid, and how he could be standing with the banner and not know what the matter was all about. While the banner handler may have ultimately offered a reluctant explanation about the nature of the dispute, I have no confidence in Jeppsen's willingness to truthfully set forth that explanation. Therefore, I do not accept his testimony.

owners association manager.[31] In addition, Resorts West has entered into a management agreement with Exclusive Resorts to take care of Exclusive's properties at Ironwood.[32] As was noted above, New Star is the general contractor on the Ironwood condominium project. However, Resorts West had no direct business relationship with either New Star or with the Respondents. On June 22, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to Resorts West advising it of their dispute with New Star and threatening protest activities." (GC Exh. 2.)

Resorts West's offices are in a two-story building on Highway 224, and it occupies space on the second floor. On the first floor are two retail establishments. At about the end of June, the Respondents established a banner outside of Resorts West office building. The banner faces Highway 224, and is approximately 20–30 feet from the driveway leading to the parking area and the building. The driveway from Highway 224 to the building is approximately 50-feet long. The only access to Resorts West's parking area and office is off of Highway 224. (GC Exh. 56.) The banner names Resorts West.

There are usually two or three people who are stationed with the banner. These banner handlers have handbills available for distribution, which name Resorts West, Ironwood project, and New Star, and explain the nature of the dispute. (GC Exh. 57.) James Ballstaedt, a director and part owner of Resorts West, testified that he had observed the banner handlers handing out handbills to people in cars that had stopped. On one occasion, he observed one of the people with the banner standing at the side of Highway 224, waving the handbills at passing motorists.[33]

According to Ballstaedt, the bannering has caused a number of Resorts West's customers to raise concerns about what was transpiring, and, in the case of one customer, to refuse to check in directly at the office.[34] As of the date of the hearing, the bannering was still continuing.

[31] Discussions between Resorts West and the developers of the Ironwood condominium project about the management of the property had been doing on for some time prior to the commencement of any bannering activity at Resorts West's office location.

[32] Prior to the commencement of any bannering activity at Resorts West's office location, Resorts West had entered into an agreement to manage at least one individual unit at the Ironwood condominium project.

[33] Following the close of the hearing, counsel for the Respondents challenged the credibility of Ballstaedt by filing a document entitled Respondents' Request for Judicial Notice in which counsel offered several attachments. Allegedly, these attachments contradicted certain statements made by Ballstaedt when testifying. Counsel for the General Counsel filed an opposition to the Request, with which I concur. I do not believe these documents are appropriate for judicial notice, and should instead have been offered at trial, when opposing counsel would have had an opportunity to challenge their relevance or, for some other reason, their admissibility. I am of the view that counsel's Request constitutes an improper attempt to offer evidence after the close of the hearing, without the opportunity for rebuttal. As it is improper, I hereby deny the Request and reject the proffered documents. Further, based on the evidence before me, I find Ballstaedt to be a credible witness.

[34] As I noted earlier, I am admitting testimony concerning complaints about the bannering by third parties for the limited purpose of establishing the reaction of those third parties, as well as to show the reaction to the complaints by the managers or principals of the entity being bannered. The testimony is not being admitted to establish the truth of the statements or complaints, which would constitute hearsay.

18. Stampin' Up

On-Point Properties, LLC (On-Point), a company controlled by the shareholders of Stampin' Up, has been engaged in the development and construction of a distribution center and office building located in Riverton, Utah, with the intent of leasing these facilities to Stampin' Up. Since in about April 2003, Okland has been the general contractor on the construction of this project. The distribution center construction was completed on about mid-June 2004. Construction of the office building was still continuing at the time of the hearing.

Scott Greenstreet is Okland's project superintendent on the Stampin' Up project. He is present on the jobsite on a daily basis. He testified that Stampin' Up and its employees began their gradual occupation of the distribution center around the end of April or the beginning of May 2004 and that Stampin' Up has increased it occupancy on a daily basis. He has had personal contact with Stampin' Up employees at the distribution center on a daily basis. Based on Greenstreet's unrebutted testimony, I conclude that the people working in the distribution center since the end of April or the beginning of May have certainly included employees of Stampin' Up.[35]

On May 19, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to Stampin' Up advising it of their dispute with Okland and threatening protest activities. (GC Exh. 2.)

The entire perimeter of the Stampin' Up jobsite was fenced. At the time that the strike against Okland began on May 26, there were two gates established at the jobsite. As depicted on General Counsel's Exhibit 58, the two gates established at the time the strike began were located at the southern and northern ends of the jobsite. The southern gate was designated as the Okland gate. As of May 26, a sign was posted at this gate reserving it for the sole and exclusive use of Okland, its employees, suppliers, delivery people and visitors. There was also a sign posted at the northern gate. This sign stated that the northern gate was not to be used by Okland, its employees, suppliers, delivery people or visitors. Instead, this northern gate was reserved for the use of everyone other than Okland. This would presumably include the subcontractors and their employees, some of whom have been working on the project from May 26 to the time of the hearing. (GC Exh. 62.)

However, because of asphalt work being performed at the northern gate, on about May 28, the subcontractor gate was relocated to the middle of the southern perimeter of the jobsite. (GC Exh. 58, referred to as the Temp. General Gate.) This middle gate consisted of two lanes, an entry road and an exit road. After May 28, the subcontractors and their employees used the middle gate. At the beginning of June, the sign from the northern gate was moved to the middle gate reserving it for the use of the subcontractors and their employees. Since the relocation of the subcontractor reserved gate, the northern gate has been used by Stampin' Up, its employees, and vendors. At

[35] I found Greenstreet to be a highly credible witness, who held up well under cross-examination. I fully credit his testimony.

the beginning of June, signs were posted at this northern gate indicating that it was not to be used for construction access.

On about June 4, the Respondents established a banner at the Stampin' Up jobsite, which banner named Stampin' Up. The banner was located just to the right of the middle gate and was approximately 10 feet from the gate reserved for the use of the subcontractors, their employees and suppliers. The banner remained at this location from about June 4, until about July 16. On about July 17 and 18, the banner was relocated to the opposite side of the middle gate. At that location, the banner was approximately 10–15 feet from the middle gate and was approximately 60–70 feet from the entry lane of that gate. Greenstreet identified a number of subcontractors and their employees that were present on the jobsite each working day during this period of time.

On abut July 18, the banner was relocated to the northern gate. The banner was located approximately 10–15 feet from the entrance lane at the northern gate. At the time that the banner was stationed at the northern gate, the gate was being used by Stampin' Up, its employees and vendors. The banner remained at this location from about July 18 until about the end of July or the beginning of August. The banner has not been displayed at the jobsite since that time.

It is important to note that, on cross-examination, Greenstreet acknowledged that from about mid-June to the time of the hearing, a period of approximately 3 months, there was a "very large trailer" with the word "OKLAND" in "very large" lettering parked just to the right of the northern most gate. That was the gate being used by Stampin' Up, its employees and vendors. The trailer was being used for the storage of light fixtures. While the trailer was located much closer to the northern most gate, it was between that gate and the middle gate, the one being used by the subcontractors and their employees. (GC Exh. 58. Greenstreet places the trailer at the point on the exhibit where the word "Gate" appears, as in "General Gate.") It appears that at that location, the trailer would have been visible to anyone traveling on the access road from which all persons entering or leaving the project would have traversed.[36]

During the period of the bannering, there were three people stationed with the banner. They had handbills available for distribution if someone stopped and asked what was going on. The handbills named Stampin' Up and Okland, and explained the nature of the dispute. (GC Exh. 3.) On the first day of the banner display, June 4, Greenstreet had a conversation with Bruce Bachman, a special representative of the Regional Council. The two men disagreed as to whether the Respondents' bannering activities were "legal." Greenstreet told Bachman that he understood that the Carpenters had a dispute with Okland, but he pointed out that the banner did not mention Okland, but only Stampin' Up. In any event, the two men did not resolve their disagreement, and Bachman gave Greenstreet a business card. (GC Exh. 67.)

[36] I assume this trailer was very similar, if not identical, to the one displayed in a photograph taken of the West Jordan Courts project, including the word "OKLAND" on the side of the trailer. (GC Exh. 82.)

19. West Jordan Courts

The State of Utah, Division of Facilities and Construction Management, is engaged in the construction of the Third District Courthouse in West Jordan, Utah. Okland is the general contractor on this project, and its contract is with the State of Utah. Okland began its work on this project in about October 2003, and the work was continuing at the time of the hearing.

The West Jordan Courts jobsite is located in West Jordan, Utah and sits approximately 300 feet off of Redwood Road. (GC Exh. 76.) At the time that the strike began against Okland on May 26, the entire perimeter of the jobsite was fenced. There were three gates established on the jobsite at that time. The Okland gate was located at the northwest corner on the jobsite. It was posted with a sign, which reserved the gate for the sole and exclusive use of Okland, its employees, suppliers, delivery people, and visitors.

The subcontractor entry gate was located at the southeast corner of the project. A sign was posted at this gate prohibiting Okland, its employees, suppliers, delivery people, and visitors from using this gate. The gate was reserved for the use of everyone other than Okland. At the same time, a subcontractor exit gate was located at the southwest corner of the project. It was marked with the same sign as was present at the subcontractor entry gate.

All of the gate signs were posted on the first day of the strike and remained posted until the fences surrounding the project were taken down on about mid-July. Jeff Hale, Okland construction project manager, testified that certain specific subcontractors and their employees have been on the project every workday during the entire period from May 26 until the date of the hearing. The subcontractor employees could access the subcontractor entry gate only off of Redwood Road. Approaching the jobsite from either the north or south on Redwood Road, the subcontractor employees would turn onto the access road at the south end of the project and then proceed to the subcontractor entry gate. To exit the project, the subcontractor employees would use the subcontractor exit gate, and would then go south to 2200 West Street, and would then go either north or south from there. (GC Exh. 76.)

On May 17, Locals 184 and 1498 sent a "Notice of Labor Dispute" letter to the Administrative Services Department of the State of Utah, and on May 24 sent a similar letter to the city of West Jordan, Utah, advising those entities of the locals dispute with Okland and threatening protest activities. (GC Exh. 2.) On June 3, the Respondents established a banner near the West Jordan Courts Project. The banner named West Jordan Courts. The banner faced Redwood Road and was located approximately 20–30 feet north of the access road that lead to the subcontractor entry gate. The distance from Redwood Road to the subcontractor entry gate itself was approximately 300–350 feet. The banner remained at that location for approximately 2 months. At that location the banner was clearly visible to anyone, including subcontractors, their employees, and suppliers, who approached the jobsite from either the north or the south on Redwood Road.

There were usually three to four banner handlers stationed with the banner. While there was no testimony specifically about whether the banner handlers possessed and distributed

handbills, presumably handbills were at least available, as admitted into evidence was a copy of a handbill that mentioned Okland and West Jordan Courts and explained the nature of the dispute. (GC Exh. 3.)

The banner was usually up from about 10 or 11 a.m. until about 1 p.m. each day. Jeff Hale acknowledged that the employees of subcontractors were at work before the banner handlers arrived, and the banner handlers left the project each day before the employees of the subcontractors finished their workday. However, according to Hale, the subcontractors received deliveries of materials during the period of time when there was bannering activity, which hours he categorized as "prime delivery time." Also, during the period of 10 a.m. to 1 p.m., the subcontractors' employees would leave the jobsite for their breaks and lunch periods, and would subsequently return to work through the subcontractor entry gate.[37]

Hale further acknowledged that directly behind the place where the banner was established on June 3, and visible from the public street, was a trailer containing the Okland trade symbol and the name "OKLAND" in large capital letters. The trailer is partly obscured by a mound of dirt in a photograph admitted into evidence. However, the banner, and behind it the trailer with the trade symbol and half of Okland's name, can still clearly be seen. (GC Exhs. 76, 82.) Also, while Hale's testimony was at this point somewhat confusing, it seems that right next to the trailer was a white building used by Okland. There was no testimony concerning the distance from the trailer to the public street. Never the less, it is obvious from the photograph that the banner was located as close to the trailer as possible, and yet still be on public property.

IV. LEGAL ANALYSIS

As I noted earlier, the facts in this matter are, for the most part, undisputed. However, the parties disagree strongly as to the legal questions presented. Unfortunately, the law in the area of "bannering" is currently unsettled. There is no Board authority directly addressing the issues of whether bannering is the equivalent of picketing for "secondary boycott" purposes, or whether peaceful bannering in conjunction with handbilling can constitute a violation of Section 8(b)(4) of the Act. There are at least three recent decisions by different administrative law judges specifically addressing these issues, as well as three decisions by separate Federal district court judges addressing the General Counsel's Motion for Temporary Injunction in bannering cases, and also, several somewhat older memoranda from the General Counsel's Division of Advice on these issues.[38] While it is axiomatic that administrative law judge decisions without Board review, decisions by district court judges on motions for temporary injunctions, and advice memoranda have no precedential authority, they are still certainly useful, and worthy of consideration, at least as to the way other authorities viewed similar issues. This is especially true where the Board itself has not yet ruled on the bannering question.

In particular, I believe it is important to at least consider the decision by United States District Court Judge Paul G. Cassell, issued in the General Counsel's "companion" case to the matter at hand, seeking a Petition for Injunctive Relief under Section 10(l) of the Act. *Benson v. Carpenters Locals 184 and 1498*, 337 F.Supp. 2d 1275 (District of Utah, 2004), Memorandum Opinion and Order Denying Motion for Temporary Injunction. During the course of the trial in this matter before the undersigned, I granted the request of the Respondents that the record be left open for the receipt of Judge Cassell's decision, as long as that decision issued prior to October 22. This ruling was made over the objection of counsel for the General Counsel, who took the position that any decision by Judge Cassell was irrelevant to the disposition of the matters before me, as the standards utilized in the two forums are different. I am, of course, aware of the different standards, with the district court required to determine only whether the General Counsel has "reasonable cause to believe" that the Unions have violated the Act as alleged in the complaint. On the other hand, I must determine whether a violation of the Act has been established by a preponderance of the evidence. Never the less, the underlying facts and legal question are obviously the same in both forums, and Judge Cassell's analysis of these matters cannot help but assist me in deciding the same issues. This is especially true where, as here, there are significant constitutional free speech issues, which district court judges would certainly have more familiarity with than would the Board's administrative law judges.

By cover document entitled Respondents' "Supplemental Authority,"[39] dated September 29, 2004, I received a copy of Judge Cassell's decision. I am hereby adding that decision into the record. (R. Exh. 14.) I will subsequently have more to say about the substance of Judge Cassell's decision.

In considering whether the Respondents' bannering activities violated the Act, it seems appropriate to start with a discussion of the statute itself. In pertinent part, the statute reads as follows:

> Sec. 8(b)(4). It shall be an unfair labor practice for a labor organization or its agents—
>
> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any

[37] This testimony from Hale was unrebutted, and there is no reason to find him anything but credible.

[38] *UBC, Carpenters Local 1506 (Best Interiors)*, 1997 WL 731444 (NLRBGC) (1997); *Rocky Mountain Regional Council of Carpenters (Standard Drywall)*, 2000 WL 1741630 (NLRBGC) (2000). In both cases, the Division of Advice concluded that bannering was not the equivalent of picketing.

[39] On October 12, counsel for the Charging Parties, New Star and Okland, filed with me a Motion to Strike Unauthorized Brief of Respondents. Counsel does not object to the Respondents' submission of Judge Cassell's decision, but only to the "Supplemental Authority," which accompanied it. Counsel for the Charging Parties contends that Respondents' counsel has taken "the unwarranted liberty of filing a brief in conjunction with submitting Judge Cassell's opinion for inclusion in the record." He asks that counsel for the Respondents' "brief" be stricken. I concur. Therefore, I will strike the document dated September 29, received from counsel for the Respondents and entitled "Supplemental Authority," and I will not consider the matters raised in that document.

goods, articles, materials, or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, *where in either case an object thereof is*— [emphasis added by me.]

[omitted]

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacture, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. . . . [First proviso] *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) . . . .(D) [omitted]

[The second proviso is omitted.]

[Third proviso] *Provided further*, That for purposes of this paragraph (4) only, *nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public,* including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . . . [Emphasis added by me.]

In general, Section 8(b)(4) of the Act is intended to prohibit labor organizations from enmeshing employers or persons in labor disputes that are not their own. According to the Supreme Court, this section of the Act reflects "the duel congressional objectives of preserving the right of labor organizations to bring pressure to bear upon offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). The Act balances protections to uninvolved employers or persons with the right of a labor organization to engage in direct action against an employer, with whom it is engaged in a primary labor dispute. See *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 100 (1958).

However, history has shown that it is not always a simple matter to determine whether an entity is a "primary" or a "secondary" (neutral) to a labor dispute. The courts and the Board have over time established rules and presumptions designed to aid in determining to what degree entities are involved in a labor dispute.[40] Of course, the Act itself defines "labor dispute" in Section 2(9) as follows: "The term 'labor dispute' includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee."* (Emphasis added by me.) This definition of labor dispute seems broad enough to encompass both primary and secondary (neutral) employers or persons. Although certainly, to be protected by Section 8(b)(4)(B) it is not necessary that a neutral entity must be totally uninvolved in a labor dispute. That is plainly not so. *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 640 (1999).

In the matter before me, there are 19 separate locations where it is alleged the Respondents violated the Act. However, in only two of those locations, involving common situs construction projects, is the General Counsel alleging 8(b)(4)(i)(B) conduct aimed at inducing or encouraging employees to cease work. The complaint alleges the majority of the locations (17), to constitute violations of Section 8(b)(4)(ii)(B) of the Act. These allegations focus on conduct by the Respondents, which is designed to "threaten, coerce, or restrain" any person engaged in commerce. However, in either case, the conduct complained of must have as one of its "objects," forcing a neutral entity to cease doing business with a primary.

According to the Act, even where such an object exists, the conduct may not be unlawful. The third proviso to Section 8(b)(4) is typically referred to as the "publicity proviso." As set forth above, it states that publicity, other than picketing, which truthfully advises the public, including consumers and members of a labor organization, that there is a primary dispute, is lawful conduct, as long as it does not have an effect of inducing individuals employed by neutral entities to not perform work at their places of employment.

Initially, this analysis will focus on the alleged violation of Section 8(b)(4)(ii)(B) of the Act. The alleged violation of Section 8(b)(4)(i)(B) occurring at the two common situs construction sites will follow later in this decision.[41]

It is the General Counsel's contention that the Unions' conduct was coercive, as it constituted "picketing" directed at neutral entities. Further, the General Counsel contends the message on the banner was unprotected speech, as it was made with "reckless disregard for the truth," and constituted "defamation by implication." The bannering is alleged to be nothing more than either traditional, or "signal" picketing.

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[40] See *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), where the Board established certain presumptions for a common situs when picketing is occurring.

[41] It should be noted that the Board has long held that (i) inducement of neutral employees also constitutes (ii) restraint and coercion of a neutral employer. *Food & Commercial Workers (Carpenters Health & Welfare Fund)*, 334 NLRB 507 fn. 8 (2001); *Teamsters Local 315 (Santa Fe)*, 306 NLRB 616, 631 (1992); *Plumbers Local 398 (Robbins Plumbing)*, 261 NLRB 482, 487 (1982); *Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 254 fn. 6 (1972).

I do not believe that bannering as occurred in this case constituted picketing. To begin with, the banners did not look like picket signs. They are 20 feet long and 4 feet high, and require at least two or three people to handle them. Once positioned for the day, the banners are stationary. There was no patrolling. They were placed on public property, facing the public street, with their message directed to the public. There was no violence, no shouting, no blocking of ingress and egress, and no attempt to engage employees in conversation. Further, it is clear to me that the message on the banners was aimed at the general public. As such, the banners seem similar to billboards, rather than picket signs.

What particularly distinguishes picketing from other types of expression is the conduct of the pickets. Typically, pickets patrol a facility or location in an effort to induce those who approach the location of the picketing to take some sympathetic action such as to decide not to enter the facility involved. It is this patrolling/picketing that provokes people to respond without inquiring into the ideas being disseminated, and which distinguishes picketing from other forms of expression. It is confrontational. Simply put, many people feel uncomfortable crossing a picket line, so they may decide not to, regardless of the message on the sign. The picket line is therefore a mixture of speech and conduct. With the banners, as with billboards, people are less likely to be intimidated by the mere presence of the banners, and more likely to read and consider the message on the banners.

As I have noted, there is no Board case on point. Although I am not bound by administrative law judge, or Federal district court judge decisions, they are at least instructive in seeing how other authorities ruled in similar cases. To date, three administrative law judges have decided the issue of whether bannering constitutes picketing. Two of those judges concluded in cases with facts similar to the matter at hand that the bannering constituted de facto picketing. *Carpenters Local 1827 (Parcel Service)*, Cases 28–CC–933 et al., JD(SF)–30–03, 2003 WL 21206515, dated May 9, 2003; and *Southwest Regional Council of Carpenters (Held Properties)*, Case 31–CC–2115, JD(SF)–24–04, 2004 WL 762435, dated April 2, 2004. However, a third judge concluded in a similar case that bannering was not picketing as it applied to the secondary boycott provisions of the Act. *Southwest Regional Council of Carpenters, et al. (Carignan Construction Co.)*, Case 31–CC–2113, JD(SF)–1404, 2004 WL 359075, dated February 18, 2004 *("Carignan Construction ALJD")*.[42]

Obviously, for the matter in dispute, with no controlling precedent, judges may reasonably disagree over the issue of whether bannering constitutes picketing. For myself, I am in agreement with the judge in the *Carignan* case.

In my view, not only is the bannering not the equivalent of traditional picketing, but I see no evidence that it constitutes "signal" picketing. As the name implies, the idea behind signal picketing is for the picketer or protester to engage in some prearranged activity or take some action that will alert the intended audience, such as the employees of neutral employers, to stop their work and "honor the picket line." Unlike traditional picketing, signal picketing does not necessarily involve patrolling with picket signs.[43] Where is the signal in the matter before me? I do not see one. Surely the holding of a 20-foot long banner facing the public street, with no shouting or disruption of any kind, and no attempt to contact neutral employees, can no more be considered a "signal" than can be a billboard. There is, of course, nothing subtle about either a 20-foot banner or a billboard. However, in my opinion, a banner, like a billboard, constitutes pure speech, and not a mixture of speech and conduct, as in the case of picketing, and is, therefore, distinguishable.

Further distinguishing the banners at issue from picketing was the message being disseminated. The banners were placed facing the public street or walkway where members of the public could easily see them, rather than where workers could easily see them. The banners did not contain the traditional message directed to employees to join the protest, but instead sought to embarrass the entity being bannered by using the expression "Shame On," with the neutral entity being named. Also, picketing by its very nature is confrontational, with the picket line serving as a warning not to cross. There was no confrontation created by the banners under the facts of this case. Any impact by the banners was caused by their message, not by the presence of the banner handlers.

In determining exactly what kind of action bannering constitutes, speech, conduct, or a combination, and what the "object" of the bannering was, it is useful to examine the "Notice of Labor Dispute" letters, which preceded the bannering activity. These letters were addressed or directed to managers or principals associated with the entities subsequently bannered. These letters explained the nature of the Respondents' labor dispute with either New Star or Okland, that the Unions intended to "protest and publicize" the dispute, and that entities, which benefited from their dealings with New Star or Okland, had an "obligation to monitor" those dealings. The Respondents warned these entities that the Unions intended to extend their protest activities to them, and specifically mentioned as one of a number of protest activities, "highly visible banner displays, and handbill distribution." Further, the Respondents asked the addresses to use their "managerial discretion" to "exclude" New Star or Okland from their projects until such time as the labor dispute was settled. (GC Exh. 2.)

It seems to me that the banners and the "Notice of Labor Dispute" letters that preceded the bannering were not so much an appeal for the public to act on the message, as they were a demand that management of the neutral entities exercise its managerial authority to stop conducting business in any way that benefited either New Star or Okland. In truth, both the

[42] All three administrative law judge decisions are currently on appeal to the Board.

[43] See *Laborers Local 389 (Calcon Construction)*, 287 NLRB 570, 574 (1987), where the Board found that picket signs, which had been stuck in or lying on the ground near a neutrals' gate, were ". . . designed . . . to induce employees of subcontractors and other secondary employers who were unionized to withhold their labor from the site." See also *Laborers Local 304 (Athejen Corp.)*, 260 NLRB 1311, 1319 (1982) (stationary signs placed on safety cones, barricades, and jobsite fence); *Teamsters Local 182 (Woodward Motors)*, 135 NLRB 851 fn. 1, 857 (1962) (stationary picket signs stuck in snow bank).

banners and the letters were an attempt by the Unions to "shame" the neutral entities into doing what the Respondents considered the "right thing," namely to stop doing business with the primary employers. In such circumstances, the Supreme Court has ruled that a union may appeal to management's business discretion to cease doing business with another, since the "publicity proviso" protected such activity, even if such activity might otherwise "threaten, coerce or restrain" management in order to accomplish the intended purpose. See *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964).

Of course, the message on the banners might also be intended to convince members of the public not to patronize those entities named on the banner. Still, if I am correct and the bannering does not constitute picketing, there could well be nothing illegal about this activity, even if it had "a cease doing business object."

In *DeBartolo Corp. v. Florida Building Trades Council (DeBartolo II)*, 485 U.S. 568 (1988), the Supreme Court held that the Court of Appeals for the Eleventh Circuit did not err in construing Section 8(b)(4)(ii)(B) of the Act as not prohibiting peaceful handbilling, urging a consumer boycott of a neutral employer, where such handbilling was unaccompanied by picketing. The Court stated that mere persuasion of customers not to patronize neutral establishments does not thereby coerce the establishments within the meaning of Section 8(b)(4)(ii)(B). The Court based this conclusion on the legislative history of the 1959 amendments to the Act. Again as with the circuit court, the Supreme Court made it clear that the Act does not proscribe peaceful handbilling and other non-picketing even though such activity has a cease doing business object. I am convinced that the bannering in question constituted nonpicketing activity analogous to a billboard or to handbilling.

The Board has applied the Supreme Court's rational in *DeBartolo II* in a number of decisions concerning speech unaccompanied by nonspeech conduct. In *Steelworkers (Pet, Inc.)*, 288 NLRB 1190 (1988), the Board found a union's consumer boycott of Pet and its divisions and subsidiaries in furtherance of its primary dispute with a wholly owned subsidiary of Pet, using newspaper advertisements, leafleting and other media was lawful even if Pet and its divisions and subsidiaries were neutrals.

Another case with certain similarities to the matter at hand is *Service Employees Local 399 (Delta Air Lines)*, 293 NLRB 602 (1989), where the Board found that a union's newspaper advertisements and handbilling of a neutral employers' potential customers to encourage a consumer boycott in furtherance of its primary dispute did not violate the Act because there was no violence, picketing, patrolling, or work stoppage. In that case, the union's primary dispute was with a nonunion janitorial service hired by Delta Airlines. The union distributed handbills on which: (1) Delta's name was prominently displayed; (2) Delta's accident and consumer complaint record was set forth; (3) the slogan appeared "It takes more than money to fly Delta. It takes nerve"; and (4) the public was urged not to fly Delta. In its initial decision,[44] the Board held that the handbill violated the Act because under the publicity proviso the Union did not truthfully advise the public, because it did not tell the public who the primary employer was. In addition, telling the public of Delta's accident and consumer complaint record did not truthfully advise the public of the nature of the primary dispute. The Board held that information that attacks a secondary employer for reasons unrelated to its role in the primary labor dispute is not the type of information the proviso was addressing. However, on remand the Board, citing the Supreme Court's decision in *DeBartolo II*, held that the union did not engage in conduct proscribed by Section 8(b)(4) of the Act. In reaching its decision, the Board noted that there was no violence, picketing, patrolling or work stoppage, and that the handbilling was peaceful and did not cause interruptions in deliveries to Delta or refusals to work by employees of Delta or any other person, and that the union was attempting to persuade consumers not to patronize Delta. Thus, the Board concluded peaceful handbilling and other non picketing publicity, even though it did not truthfully advise the public of the nature of the primary dispute, was not proscribed by the Act.

Assuming bannering does not constitute the equivalent of picketing and is, therefore, protected speech under the rational in *DeBartolo II*, counsel for the General Counsel offers the alternative theory that the publicity proviso would still not protect the specific bannering in question, because the language on the banners was allegedly misleading, untruthful, and constituted "defamation by implication." To begin with, a case could certainly be made that even without the publicity proviso the Respondents' bannering activity, as speech only, did not constitute coercion within the meaning of Section 8(b)(4)(ii)(B) of the Act. Under such a scenario, the Unions' bannering activity was lawful, without resort to the publicity proviso to "save" it. Never the less, for purposes of this discussion, I will assume the necessity for the bannering to fall within the proviso.

As I indicated earlier, the definition of "labor dispute" found in Section 2(9) of the Act is broad enough to encompass both primary and secondary employers. The language makes it clear that a controversy concerning terms and conditions of employment does not depend on "whether the disputants stand in the proximate relation of employer and employee." Of course, in a labor dispute, such as the one at hand, the primary employer, namely New Star or Okland, is the main target. Never the less, neutrals or secondaries are still involved. While the secondaries being bannered may only be indirectly or incidentally involved in the Unions' dispute with the primary, they are affected to some degree. Therefore, there is nothing untruthful about the Unions naming these entities on the banners and indicating the existence of a "labor dispute."

Beyond the actual words on the banner, the General Counsel argues that the message is fraudulent and designed to deceive the general public. It is the position of the General Counsel that since the primary employer is not named on the banner and the word "shame" is directed to the only entity named, that being the secondary, that the public is being deceived into believing that the central dispute is really with the secondary. I disagree.

To begin with, the entities named on the banner are in every instance involved with the primary, either New Star or Okland, to some degree. Granted, the involvement in some of the cases is indirect, and perhaps in a few of the cases even remote.

[44] 263 NLRB 996 (1982).

However, there is some involvement in every instance such that in none of the cases has the involvement been fabricated or "made up." It can be legitimately claimed that in every instance the secondary has profited or may profit, directly or indirectly, from work performed or to be performed by New Star or Okland.

This is precisely the message that the Unions set forth in the handbills, which accompanied the bannering. From the credible evidence presented, it appears that at each location where bannered occurred there were handbills available that further explained the nature of the dispute.[45] (GC Exh. 3.) As with the prebannering "Notice of Labor Dispute" letters (GC Exh. 2), the General Counsel does not allege that there was anything improper about the handbills themselves. The handbills directed "shame" upon either New Star or Okland and explained the Unions' dispute with the named primary. "Shame" was also directed to the named secondary, the entity that was being bannered, and the Unions explained the relationship between the primary and the secondary. The Unions then proceeded to explain their position that entities "either directly or indirectly" involved in the dispute with the primary should use their "managerial discretion" to influence the dispute.

The publicity proviso specifically states that a union engaged in a secondary publicity campaign may publicize it not only to the general public, but also to "consumers and members of a labor organization." The Unions took care to place their banners on public property with the message on the banners facing outward toward the public walkway or streets.[46] In some instances these were heavily trafficked, busy streets. In so doing, the Unions were legitimately attempting to reach the widest audience possible. Obviously, some pedestrians and most drivers of vehicles would have had only a fleeting opportunity to view the language on the banner. They would see the name of the entity being bannered with the words "labor dispute" and "shame" and probably assume the secondary had some kind of a labor dispute. In fact, that was accurate. The secondary was involved, at least indirectly, in a labor dispute. The absence of more information on the banner did not make the language false. In any event, most viewers of the banner would not understand the difference between a primary and secondary employer, even if the banner had contained such additional information.[47]

For those members of the public, consumers, or others who desired additional information, they could ask the banner handlers. In that case, the banner handlers were instructed to give the inquiring individual a handbill. The practice was somewhat subjective and varied from location to location. From the undisputed evidence, it is fairly clear that the banner handlers were instructed not to orally give out any information, but instead to provide a copy of the handbill. Some banner handlers were more aggressive than others and would affirmative offer a handbill to passing pedestrians and motorists. Others would simply wait until a passing individual inquired about what was happening.

In any event, the handbills further explained the nature of the dispute, and there is no claim by the General Counsel that anything in the handbills was fraudulent. There can be no dispute that under *DeBartolo II* the distribution of the handbills was protected as free speech. It seems to me that the availability of the handbills to augment and explain the message on the banners further supports the argument that the banners are also protected as speech.

Regarding counsel for the General Counsel's argument that the Respondents' activities constituted "defamation by implication," I am frankly confused by it. Counsel is apparently contending that the failure to more full explain the nature of the dispute with the primary, naming of the secondary on the banner, and the use of the terms "labor dispute" and "shame" caused the secondaries to be viewed in a defamatory and false light. This allegedly coerced the neutrals within the meaning of Section 8(b)(4)(ii)(B). As noted above, I have concluded there was nothing false or misleading about the banners. Further, regarding the use of the word "shame," to the extent that it would "embarrass" the secondary employers, such appeals leading to the embarrassment of neutrals are permissible. *NLRB v. Business Machine & Office Appliance Mechanics Conference Board (Royal Typewriter Co.)*, 228 F.2d 553, 560 (2d Cir. 1955), cert. denied 351 U.S. 962 (1956).[48] Therefore, I find nothing written on the banner or in the accompanying handbill that could be considered fraud or defamation as would constitute coercion within the meaning of the Act.[49]

In my opinion, the General Counsel's view of Section 8(b)(4)(ii)(B), under the circumstances of this case, constitutes an overly broad interpretation, which would tend to abridge the First Amendment. In fact, three United States district court judges have so found in similar cases by denying the General Counsel's request for a temporary injunction under Section 10(l) of the Act. *Overstreet v. Carpenters No. 1506*, Civil No. 03-0773 (JFS), (S.D.Ca. May 7, 2003) (unpublished), appeal pending, Docket No. 03-56135 (9th Cir.); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp. 2d 1155 (C.D. Ca. 2003), appeal pending Docket No. 03-57228 (9th Cir.); *Benson v. Carpenters Locals 184 and 1498*, Civil No. 2:04-CV-00782 (PGC) (D. UT, Sept. 27, 2004), 2004 WL 2181762. As I noted earlier, in the *Benson* case, Judge Cassell denied the in-

[45] While the testimonial record does not directly establish the presence of handbills at several of the bannering sites, there is no conclusive evidence to establish their absence. In view of the totality of the evidence of the existence of hanbills at all the other sites, it is certainly reasonable to assume and conclude that they were present at every bannering site.

[46] Concomitantly, this had the effect of directing the message away from the employees of the secondary employer.

[47] A message on a banner, by its very nature, must be short and pithy. It would simply not be practical to fill a banner with too much information and expect a passing pedestrian or motorist to quickly process that information.

[48] While this is an old case, which predates the 1959 amendments to the Act, it has not been overruled.

[49] Certainly there is nothing that precludes an aggrieved secondary entity from instituting a suit for damages in State court, assuming there exists an objective basis for believing that defamation has occurred. See *B E & K Construction Co. v. NLRB*, 536 NLRB 516 (2002).

junction on the very same facts as are present in the matter before me.[50]

I am, of course, aware of the different standards for the granting of an injunction as opposed to the finding of an unfair labor practice. Never the less, when it comes to free speech issues and the First Amendment, much can be gained from reviewing the decisions of district court judges who deal with these issues much more frequently than do the Board's administrative law judges.

Judge Cassell relies heavily on the Supreme Court's decision in *DeBartolo II*, supra, and the Court's finding that mere handbilling, without picketing, does not coerce secondary employers. Judge Cassell noted the Supreme Court's warning that any broader reading of the statute would effectively prohibit newspaper, radio, and television appeals not to patronize the secondary business, a prohibition that would raise serious First Amendment concerns.

In the case before him, Judge Cassell found handbilling accompanied by a banner to be "the functional equivalent" of the handbilling alone that the Supreme Court approved in *DeBartolo II*. He concluded that the General Counsel was seeking to find the Unions' message coercive, not its actions,[51] and that was precisely the argument that the Supreme Court had rejected. Judge Cassell concluded that the activities complained of were "nothing more than publicity (to wit, large banners) short of ambulatory picketing. . . ." He found that the bannering, in conjunction with the distribution of handbills, on public property adjacent to secondary entities was "not activity proscribed by the NLRA."

Citing the district court decision in *Kohn*, supra, Judge Cassell emphasized that under *DeBartolo II* the General Counsel's proposed construction of the statute, which would outlaw the Unions' display of the banner at the sites of secondary employers, would raise serious First Amendment issues. However, Judge Cassell was of the view that these issues need not be confronted because of the availability of a reasonable, alternative construction that conforms to congressional intent and the legislation's purposes.

I share Judge Cassell's concerns about the General Counsel's overly broad interpretation of Section 8(b)(4)(ii)(B) of the Act. The General Counsel's contention that peaceful bannering constitutes coercion under the statute creates serious First Amendment questions. As the Supreme Court stated in *DeBartolo II*, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

In my opinion, there is certainly an acceptable interpretation of the statute that avoids the constitutional questions and that is not plainly contrary to the intent of Congress. That would be to conclude that the Unions' bannering activity does not fall within the sphere of activity prohibited by Section 8(b)(4)(ii)(B) of the Act. Certainly, the decisions by the three United States district court judges referenced above and by the administrative law judge in the *Carignan*, supra, case support the argument that the Unions' bannering activity is not violative of the Act.[52] I have reached the same conclusion.

After *DeBartolo II*, it is clear that a union may affect the business operations of neutral employers as long as it does so only with words, without picketing or violence. In the instant case, I am of the opinion that the Respondents' handbilling and display of its banners was pure speech unaccompanied by nonspeech conduct. As I previously found, the Unions did not engage in any conduct that would cause the bannering to be considered tantamount to picketing. There was nothing confrontational about the bannering. Further, I have rejected the General Counsel's argument that the wording on the banners was false or defamatory.

As pure speech, the banners did not constitute coercion of the secondary entities. The banners constituted an appeal to consumers and to the managers and principals of the secondary entities to do what they could to influence the course of the dispute between the Unions and New Star or Okland. As long as this appeal was through the message displayed on the banners and handbills, and not through picketing, patrolling, or violence, there was nothing unlawful about the Respondents' activities.

The publicity proviso did not "save" the Respondents' bannering activities, since by its very nature, pure speech, it did not constitute coercion. However, the proviso serves as a further reminder that publicity, other than picketing, directed toward the public and explaining a labor dispute, is not unlawful, regardless of whether one of its objects may be for secondary purposes.[53]

Accordingly, I conclude that the Respondents' bannering activities did not constitute a violation of Section 8(b)(4)(ii)(B) of the Act at any of the locations where the complaint alleges that such bannering occurred.

The complaint also alleges a violation of Section 8(b)(4)(i)(B) of the Act at two locations, Stampin' Up and West Jordan Courts.[54] These locations are referred to as common situs projects because the primary employer, either New Star or Okland, and various secondary employers were working at these locations. The General Counsel's contentions are premised on its position that the Unions' bannering activities consti-

[50] The unfair labor practice case before me and the case before Judge Cassell where an injunction is being sought are premised on the same set of facts, and can certainly be considered "companion" cases.

[51] The judge noted that there was no allegation that the union representatives shouted, patrolled, blocked entrances, acted aggressively, or even initiated verbal conversations with the public.

[52] As was previously noted, I am aware that the decisions of district court judges and administrative law judges do not have precedential authority. Never the less, such decisions are certainly worthy of consideration, and serve the useful purpose of demonstrating how other authorities dealt with similar issues.

[53] There was no evidence that the Unions' bannering activities caused any employee of any secondary to refuse to perform his job or to strike. Therefore, the "effects" exception to the publicity proviso does not apply.

[54] I noted earlier that (i) inducement of neutral employees qualifies as (ii) restraint and coercion of a neutral employer, and the General Counsel has also alleged the bannering at the two common situs projects as violative of Sec. 8(b)(4)(ii)(B). My discussion and conclusions regarding Sec. 8(b)(4)(ii)(B) applies to these two locations as well.

tuted picketing. The Board has long held that picketing must be conducted so as to minimize its impact on neutral employers insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the employees of the primary employer. *Nashville Trades Council (H. E. Collins Contracting Co.)*, 172 NLRB 1138, 1140 (1968). In *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), the Board established standards for evaluating the legality of common situs picketing. Failure to comply with any one of the *Moore Dry Dock* criteria creates a presumption that the picketing is for an unlawful secondary purpose and therefore violates the Act. *Electrical Workers Local 332 (W.S.B Electric)*, 269 NLRB 417 (1984); *Operating Engineers Local 150 (Harsco Corp.)*, 313 NLRB 659, 668 (1994). The General Counsel argues that the Respondents have failed to comply with the standards as set forth in *Moore Dry Dock*. Allegedly, the Unions violated the Act through their bannering by inducing individuals employed by neutral employers to engage in a strike.

As I said, the General Counsel's contentions are based on his theory that bannering constitutes picketing. Having already decided that bannering, under the circumstances of this case, did not constitute picketing, there was no picketing at the two common situs locations. With no conduct that could be construed as picketing, there is no requirement that the Unions adhere to a reserved gate system. Therefore, the Unions did not violate the Act, even assuming, for the sake of this discussion, that they did not display their banners by the rules applicable only to common situs picketing.[55] Accordingly, I conclude that the Respondents did not violate Section 8(b)(4)(i)(B) of the Act as alleged in the complaint.

Therefore, in conclusion, I shall recommend that the complaint be dismissed in so far as it alleges any violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

Based on the foregoing findings of fact and analysis, I make the following

CONCLUSIONS OF LAW

1. New Star General Contractors, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Okland Construction Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. All of the above-named employers and/or persons are persons engaged in commerce within the meaning of Section 2(1), (6), (7), and Section 8(b)(4)(B) of the Act.
4. Local 184, Local 1498, and the Regional Council (collectively the Respondents) are all separate labor organizations within the meaning of Section 2(5) of the Act.
5. The Respondents have not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[56]

ORDER

The complaint is dismissed in its entirety.

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[55] In light of my finding that handbilling did not constitute picketing, I feel it unnecessary to discuss in detail whether the Unions' activities complied with the presumptions of *Moore Dry Dock*. However, I would simply note that the integrity of the reserve gate system at both the Stampin' Up and West Jordan Courts projects was suspect in view of the fact that trailers with the name of the primary employer, Okland, prominently displayed were located in close proximity to the public street. During part of the time in question, the Unions displayed their banners on the public street as near to these trailers as possible. Certainly, an argument could be made that the Respondents chose these particular locations to banner because they assumed the employees of the primary had access to these trailers, and they wished to make their appeal to the primaries employees.

[56] 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.