Local 560, International Brotherhood of Teamsters *and* County Concrete Corporation. Cases 22–CC–068160, 22–CC–071865, and 22–CC–001522

May 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

At issue in this case is whether the Respondent Union, Local 560 of the International Brotherhood of Teamsters, violated Section 8(b)(4)(ii)(B) of the Act by unlawfully enmeshing two neutral employers in its area standards dispute with the Charging Party, County Concrete Corporation (County or County Concrete). We agree with the judge that the Union violated the Act, but only as set forth below.[1]

I. OVERVIEW

In the spring of 2011, the Union was engaged in an area standards dispute with County Concrete, claiming that County was underpaying its drivers, thereby depressing the wages of all similar workers in the local area. The Union engaged in picketing and other actions in support of its position.

On April 26, 2011, to further publicize the dispute, the Union sent a letter to area construction industry employers and multiemployer associations. The letter stated that the Union would comply with the relevant law governing picketing and would target its picketing solely at County, and not at neutral businesses. The complaint alleges that the Union twice violated Section 8(b)(4)(ii)(B) by threatening to picket neutral masonry contractors Sharp Concrete Corporation (Sharp) and Macedos Construction LLC (Macedos), with the intent of coercing them to cease doing business with County. As discussed below, we agree with the judge that the Union unlawfully threatened Sharp in a November 2011 telephone conversation. We reverse, however, the judge's finding that the Union unlawfully threatened Macedos during a December 2011 telephone conversation.

II. LEGAL PRINCIPLES

Section 8(b)(4)(ii)(B) of the Act prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute.[2] Section 8(b)(4) reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). In determining whether union conduct constitutes lawful primary activity directed against the offending employer or unlawful secondary activity directed against a neutral employer, where the primary and neutral employers perform separate work on the same premises, the Board in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950), established four criteria which, if met, presumptively indicate valid primary activity.[3] However, even though a union may be in compliance with the *Moore Dry Dock* standards, its conduct will be found

[1] On February 15, 2013, Administrative Law Judge Lauren Esposito issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed exceptions and a supporting brief. The Acting General Counsel filed a letter brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. 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 only to the extent consistent with this Decision and Order.

Case 22–CC–001522 was initially resolved by an informal settlement agreement. In this proceeding, the consolidated complaint alleged that the allegations in Cases 22–CC–068160 and 22–CC–071865 constituted breaches of the settlement agreement, and the General Counsel asserted it was entitled to a default judgment according to the terms of the settlement agreement. At the parties' request, the judge severed Case 22–CC–001522 and submitted it to the Board for further proceedings on the General Counsel's Motion for Default Judgment, where it remains pending before us. The Charging Party's request for enhanced remedies in the present case depends, in part, on our decision in the severed case, and we shall rule on the request in the subsequent decision. As discussed below, in this decision, we find the Union engaged in only one unlawful telephone conversation. At present, an expansion of the judge's recommended remedy is not justified.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have substituted a new notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[2] Sec. 8(b)(4)(ii)(B) makes it unlawful for a union to:

> threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . .
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[3] The four criteria are that (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer. See, e.g., *Teamsters Local 315 (Santa Fe)*, 306 NLRB 616, 624–625 (1992), enfd. sub nom. *NLRB v. General Truck Drivers Local 315*, 20 F.3d 1017, 1021–1022 (9th Cir.), cert. denied 513 U.S. 946 (1994).

unlawful where there is independent evidence that the union had an unlawful secondary objective to enmesh the neutral employer in the primary dispute. *Electrical Workers Local 441 (Rollins Communications)*, 208 NLRB 943, 944 (1974), remanded 510 F.2d 1274 (D.C. Cir. 1975), reconsidered and affd. 222 NLRB 99 (1976).[4] To make that determination, the Board examines the entire course of conduct engaged in by the union. Id.[5]

Applying these standards, the Board has found it unlawful for a union to make a statement to a secondary employer requiring it to take "specific affirmative action" as a condition for the union not engaging in picketing. See *Rollins Communications,* supra at 944. In contrast, the Board has held that a union may lawfully inform neutral businesses that the union will stop picketing the common site if the work is performed by a contractor that pays area standards. In *Carpenters (Douglas Co.)*, 322 NLRB 612, 612 (1996), for example, the Board found it lawful when the neutral general contractor asked, "[W]hat it would take to resolve this," and the union responded, "[T]o have a prevailing wage contractor do the work." The union then "noted that [the primary employer's] owners also controlled an employer which met area standards." Id. at 613. The Board held that such statements "can reasonably be construed simply as a description of the . . . dispute with [the primary], which could end the dispute by paying prevailing wages and benefits." Id.

The central question in this case is whether the Union went beyond explaining and publicizing the dispute and its intent to engage in lawful primary picketing, and instead threatened neutral employers to cease doing business with County.

III. FACTS

Our determination of whether the Union violated the Act as alleged relies on three key pieces of evidence: (1) the Union's letter publicizing its area standards dispute with County and providing *Moore Dry Dock* assurances; (2) a recorded telephone conversation between officials of Sharp and the Union; and (3) testimony concerning a telephone conversation between officials of Macedos and the Union.

1. The *Moore Dry Dock* assurances in the Union's letter.

After summarizing the campaign against County, the Union's letter states, in part:

> So that there can be no claim of confusion or assertion of misunderstanding of any future conversations with Local 560 Business Agents, Local 560 advises that all "threats to picket" are made with, and actual picketing, will be conducted in accordance with, Moore Dry Dock Standards for Picketing at a Secondary Site, as indicated below . . . [reciting legal standard]. . . .
>
> Local 560 does not seek to enmesh your company in its dispute with County Concrete. Whichever redi-mix company you decide to utilize, we recommend prudence be taken to determine what rates of pay and benefits the Company pays its drivers.
>
> If you have any questions in regard to the meaning of the Moore Dry Dock Standards, you should contact the National Labor Relations Board or your own counsel. Because of previous claims of improper statements being made by Local 560 Business Representatives, Local 560 Business Representatives are under instruction that they shall not add to, supplement, or explain this letter to any contractor, and you are specifically advised that any such statements are not operative or authorized such that they may not be claimed to be made against Local 560's interests.

The letter is dated April 26, 2011, but the evidence demonstrates that the Union widely disseminated the letter during the area standards campaign. Both Sharp and Macedos received the letter.

2. The telephone conversation between Sharp and the Union.

In the fall of 2011, Sharp was working at a construction site at St. Peter's College in Jersey City, New Jersey. Sharp's president, John Domingues, attended a meeting arranged by the Hudson County Building Trades Council regarding the project. At the meeting, the contractors were told that the Union's president, Tony Valdner, had not been able to attend, and everyone was asked to call him later.

Domingues then returned to his office, accompanied by a representative of County, and telephoned Valdner. Unbeknownst to Valdner, Domingues and Sharp recorded the conversation. The complete transcription of this conversation is as follows:

> JOHN DOMINGUES OF SHARP CONCRETE: Hi Tony, this is John from Sharp Concrete.
>
> UNION PRESIDENT TONY VALDNER: Yes. Hi, how are you?

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[4] It is unnecessary to find that the sole object of picketing is unlawful; it is sufficient that the union possess *an* unlawful object. *General Service Employees Union Local 73*, 239 NLRB 295, 303 (1978).

[5] See also *Electrical Workers Local 38 (Andy Frain, Inc.)*, 221 NLRB 1073, 1074 (1975) (8(b)(4)(ii)(B) (analysis properly considers the context in which allegedly unlawful statements are made).

DOMINGUES: Good.
VALDNER: What can I do for you?
DOMINGUES: Pat told me to give you a call and just touch base with you. We are doing the concrete over at St. Peter's in Jersey City.
VALDNER: Right.
[Inaudible]
[According to the uncontested testimony of Domingues, at this point Valdner asked Domingues "who [Domingues] planned on using for a supplier on that project, and [Domingues] said County Concrete."]
VALDNER: County Concrete is no good.
DOMINGUES: They are no good.
VALDNER: No good. No good. I will be putting a picket line against you . . . an informational picket line. They are non-union. They don't pay the area standards.
DOMINGUES: Okay.
VALDNER: They don't pay the area standards. Before you run into a problem. Alright? You have Eastern, you have Weldon, you have Colonial, you have Service.
DOMINGUES: Okay.
VALDNER: You have Crane Concrete out of Milisevik. Colonial is out of Newark. Eastern is out of Jersey City. [Inaudible.]
DOMINGUES: I am going to do this, only because I went in with County's price. They have done a couple of jobs with us.
VALDNER: Right.
DOMINGUES: I am going to call County and I will have them give you a call. I thought they were union.
VALDNER: No they are not union and they don't pay the area standards. . . . They have been torn off a lot of jobs, John. They don't pay the area standards. We went before the Labor Board and we can picket the jobs. I will send you a letter and everything that my lawyer wrote up. They are not good. They don't pay the area standards and that's what I will picket them. Area standards.
DOMINGUES: Okay. I am going to call my salesman over there if that's okay and I will have him. . . . .
VALDNER: That's fine with me. He's union and this and that. I'm telling you. I will put up an informational picket line and the trades won't cross it. And I'm not doing anything wrong by doing that. The Labor Board told me that I can do that. Okay, sir?
DOMINGUES: Okay, my man. I will let you know.
VALDNER: Bye-bye.
DOMINGUES: Thanks.

After the conversation ended, Valdner faxed Domingues a copy of the April 26 letter.

3. The telephone conversation between Macedos and the Union.

In December 2011, Macedos began working at a construction site for Novartis in East Hanover, New Jersey. Numerous meetings were held at which the Union informed the contractors and subcontractors on the project of the area standards dispute between the Union and County. The Union distributed its *Moore Dry Dock* letter at these meetings, and Macedos received copies.

At the meetings, the Union also explained that the dispute could be resolved if either County's drivers were paid area standard wages or if another contractor, whose drivers were paid area standard wages, was selected to supply the concrete. Notwithstanding the Union's statements, Macedos used County as its concrete supplier.

In late December, when Macedos' general superintendent, Antonio Vieira, heard that "there was talk that [the Union was] going to picket the job" in early January, he called Union Agent Joe DiLeo. Vieira asked why the Union would be picketing, and DiLeo stated that "County would have to pay the [union area standard] wages or else he would picket the job." Vieira said that he needed to use County because the concrete was already purchased, and asked the Union not to picket. DiLeo responded that, if Vieira did not want the Union to picket, Vieira "would have to get somebody else because County is not paying the wages." DiLeo then mentioned the names of other suppliers that were paying area standards. Vieira asked why the Union was singling out Macedos, when another contractor on the same job was also using County. DiLeo stated that the other contractor had agreed not to use County again on that job.

Vieira then asked what County would have to pay to meet area standards. DiLeo answered "an extra $15 an hour." Vieira and DiLeo then discussed whether Macedos could make up the difference by paying the drivers extra. They discussed whether Macedos would have to pay extra for the whole day, or only the time on site, and whether Macedos would or could make payments to the Union's benefits funds. DiLeo said he would have to check with his boss about those issues.[6] DiLeo then assured Vieira that "if the guys were paid the right amount, it wasn't a problem."

Vieira and DiLeo also discussed whether it would be feasible to obtain another supplier. Vieira was worried

[6] On direct examination, Vieira suggested that DiLeo flatly refused to allow Macedos to make up the difference. But on cross-examination, Vieira clarified that DiLeo was actually saying that he would have to check with his boss about how Macedos could make up the difference in the area standards.

that concrete suppliers would "take advantage" of him by charging high prices if he was "bidding a job out last minute." DiLeo said, "[H]e would talk to the suppliers [to get them to] do the right thing."

Vieira said he would have to think about it over the weekend. DiLeo told him to "get back to us by Tuesday or else we're picketing." On Tuesday, DiLeo called Vieira and said that he had asked another supplier and "they haven't heard from [Macedos]." Vieira responded that Macedos was still considering its options. A few weeks later, on January 18, 2012, the Union engaged in picketing that is not alleged to be unlawful.

IV. ANALYSIS

The judge found that there was sufficient independent evidence of the Union's unlawful intent to coerce both Sharp and Macedos to cease doing business with County to establish that the Union violated Section 8(b)(4)(ii)(B) in both telephone conversations. We agree that the Union unlawfully threatened Sharp, but reverse the judge's finding that the Union unlawfully threatened Macedos.[7]

1. There is sufficient independent evidence of an unlawful intent to coerce Sharp.

The telephone conversation between Domingues and Valdner contains direct evidence that the Union's threats to picket the common worksite were made with an unlawful secondary objective to force or require Sharp to cease doing business with County Concrete. We conclude that the Union violated the Act based on all of the circumstances including Valdner's explicit statements.

Union President Valdner made statements to Sharp President Domingues that we consider admissions of the Union's unlawful intent. Valdner told Domingues that he would be "putting a picket line against you"—referring to *Sharp* itself, rather than County. Valdner reaffirmed this secondary intent when he additionally cautioned Domingues that "before *you* run into a problem" you should consider these other concrete suppliers instead. In so stating, Valdner made clear that the threatened picketing was specifically aimed at neutral employer, Sharp. *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 556 (9th Cir. 1988) ("We would be less sympathetic had Local 433 told [the neutral] 'we will picket you,' and then claimed that it was referring only to an intention to picket [the primary]."). It is quite clear from this conversation that the "problem" that Sharp would "run into" was a secondary boycott of Sharp's business: "I'm telling *you*. I will put up an informational picket line and *the trades won't cross it*." (Emphasis added.) The only discernible purpose for making this statement was to coerce Sharp to cease doing business with County. Although Valdner later stated that he would picket "them" (meaning County), this is not an ambiguity or contradiction that undermines the Union's expressed intent to picket Sharp. A picket can have multiple targets, including both Sharp and County. As long as any one of those targets is a neutral, the picket is unlawful. See *Rollins Communications,* supra; *Sheet Metal Workers Local 7 (Andy J. Egan Co.),* 345 NLRB 1322, 1323 (2005).

The Union asserts that it should be immune from the statements made by Valdner, because it had complied with *Moore Dry Dock* by notifying employers of its primary object in the April 26 letter. But the threats to picket in the telephone conversation nonetheless are unlawful, even though the *Moore Dry Dock* standards were met because Valdner expressly admitted the Union's additional intention to picket a neutral business.

The April 26 letter expressly assures companies that there will be no effort to enmesh neutrals, and, on its face, conforms to the law. The letter disclaims any contrary statements by the Union's agents, and assures neutrals that the Union is taking steps to control the danger of unlawful threats and picketing.

In this case, however, the lawful purpose stated in the letter was not only directly contradicted by the very person who signed the letter, the union president himself, it was in fact used offensively against the neutral, to further the Union's effort to coerce Sharp to cease doing business County Concrete:

> We went before the Labor Board and we can picket the jobs. I will send you a letter and everything that my lawyer wrote up. . . . I will put up an informational picket line and the trades won't cross it. And I'm not

[7] Member Johnson would adopt the judge's findings, for the reasons she gives, that statements made by the union representatives in both telephone conversations violated Sec. 8(b)(4)(ii)(B). In his view, there is no legally material difference in the threats made by the Union's representatives during the two conversations, as both conversations demonstrate independent evidence of unlawful secondary object. He is not persuaded by his colleagues' characterization that DiLeo "apparently did not care whether Macedos 'ceased doing business with County.'" DiLeo clearly explained to Vieira that the only reason County was allowed on the job for another contractor was that the contractor promised the Union that it would *not* use County in the future. That statement is anything but a mere explanation of the nature of the primary dispute—it is direct evidence of unlawful intent. Member Johnson observes that his colleagues fail to consider that after DiLeo gave Vieira the names of union-approved ready-mix companies and then learned that Vieira did not follow up with them, DiLeo called Vieira back and again threatened to picket the job. In contrast to his colleagues, Member Johnson recognizes that the judge explicitly credited Vieira's unrebutted testimony that DiLeo insisted that Macedos terminate its agreement with County and engage a supplier that had a contract with the Union in order to avoid picketing. Considering all the evidence in its totality, and in accord with the judge, Member Johnson would find that the Union unlawfully threatened Macedos, as it did Sharp.

> doing anything wrong by doing that. The Labor Board told me that I can do that. Okay, sir?

When the signatory of the letter makes a direct threat to picket a neutral, and raises the specter of economic harm to the neutral, the threat is only amplified by the inaccurate assertion that the Union has the backing of the Board and will transmit the letter to prove it.

On exceptions, the Union argues, among other things, that the recorded telephone conversation was a "set up" by County and Sharp. This defense lacks merit. Although Sharp technically placed the call, it was Valdner who actually initiated the conversation by asking attendees at the Trades Council project meeting to contact him.[8] Even if Sharp had "carefully planned and devised to be threatened," the unlawful threat was nonetheless made by "an experienced union official" and "[t]here is no indication that [the employer] planted the seeds of unlawful conduct in an otherwise innocent mind." *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 748 fn. 100 (1993), enfd. 103 F.3d 139 (9th Cir. 1996); see also *Times-Herald Record*, 334 NLRB 350, 354 (surreptitious recordings admissible), enfd. 27 Fed. Appx. 64 (2d Cir. 2001).[9]

Under all of these circumstances, we find that the Union violated Section 8(b)(4)(ii)(B) in its telephone conversation with Sharp.

2. There is insufficient evidence of an unlawful intent to coerce Macedos.

> The telephone conversation with Macedos does not evidence an unlawful intent.

Unlike its conversation with Sharp, the Union's conversation with Macedos is notable for lacking any reference to establishing a picket line "against Macedos" or mention of the crossing of picket lines. When Macedos Superintendent Vieira directly asked Union Agent DiLeo why the Union would be picketing, DiLeo stated, "County would have to pay the [union area standard] wages or else he would picket *the job*." Statements concerning picketing "the job" are consistent with primary picketing at the worksite. See *Ironworkers Local 433*, 850 F.2d at 556.

DiLeo expressed no interest in whether Macedos "ceased doing business" with County. When Vieira asked whether Macedos could continue doing business with County and avoid having a picket line at the common site by "making up the difference" and paying the County drivers extra, DiLeo did not reject the idea, and was concerned only with pragmatic questions probing whether such payments would actually meet the area standards. DiLeo was unsure about these details, and informed Vieira that he would have to check with his boss. But the bottom line was that "if the guys [a]re paid the right amount, it [i]sn't a problem."

We are satisfied that the only concern expressed by DiLeo was whether area standards were met. This is a textbook illustration of a lawful, primary objective for area standards picketing. Unlike in *Rollins Communications*, supra, DiLeo did not demand that Macedos "take specific affirmative action" to avoid the pickets; rather, the "choice of action" was left up to Macedos. 208 NLRB at 944. DiLeo merely explained the Union's lawful intent that it would picket if and only if area standards were not met. Those comments, in conjunction with the Union's *Moore Dry Dock* letter, establish that the Union did not threaten Macedos. DiLeo said nothing in the conversation to undermine the clear statement in the letter that the sole purpose of the picketing was primary.[10]

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[8] The dissent suggests that "Domingues' only reason for recording the conversation was the hope that Valdner would misstate the letter's carefully drafted contents." We find it easily as likely that Domingues recorded the conversation because he expected to be unlawfully threatened, and wanted to have proof.

[9] Member Hirozawa would not find the violation. In his view, Valdner's statements during the telephone conversation with Sharp President Domingues did not negate or modify the Union's expression in its April 26 letter of an intent to apply pressure against the primary employer, County.

There is no dispute that the letter unequivocally declared that lawful objective and that Domingues had received the letter. Valdner's statement during the conversation that the Union would picket "them"—meaning County—and his reference to County's "jobs" and an "informational picket line" also expressed the Union's lawful, primary aim. Valdner's remark that "the trades" would not cross a picket line was a prediction, not a threat; he could control whether his union would picket, but not what others would do in response. The absence of unlawful intent is further evidenced by Valdner's reference to the Union's April 26 letter and his faxing it to Domingues immediately upon the close of the conversation. Considered in light of the Union's entire course of conduct and Valdner's repeated assertion of the Union's legal rights, his one statement that the Union will picket "you" was, at worst, a layperson's flawed articulation of sophisticated legal concepts. See *Rollins Communications*, supra, 208 NLRB at 944; see also *NLRB v. Ironworkers Local 433*, supra, 850 F.2d at 556–557 (picket "you" or "picket the job" statements derive meaning "from the context of the entire conversation," including "express[] advising" of lawful objective).

Member Hirozawa does not dispute the admissibility of the recording of the conversation between Valdner and Sharp President Domingues. He does, however, observe the obvious, namely that Domingues' only reason for recording the conversation was the hope that Valdner would misstate the letter's carefully drafted contents.

[10] Chairman Pearce acknowledges that the Sharp and Macedos conversations share at least two significant similarities: (1) in both conversations the Union gave a neutral company the names of alternative concrete suppliers; and (2) both contractors were provided a letter assuring them that the Union's intent was primary and that *Moore Dry Dock* would be followed. Although his colleagues would rely primarily on one or the other of these two points to either forbid or permit both

In finding a violation, the judge relied primarily upon DiLeo's response to Vieira's questions about the feasibility of changing contractors. DiLeo provided the names of suppliers which paid area standards, and, when Vieira expressed concerns that he might be "taken advantage" of, DiLeo offered to help Vieira communicate with these suppliers to ensure that Macedos obtained a fair quote. During the conversation, Vieira asked DiLeo why the Union was singling Macedos out, when another contractor on the same job was also using County. DiLeo stated that the other contractor had agreed not to use County again on that job.

It is clear, however, that Macedos was reaching out to the Union to ask how it might be able to avoid the picketing. As the Board noted in *Electrical Workers Local 38*, 221 NLRB 1073, 1074 (1975), when a statement of this sort "was made in reply to a question" from a neutral, it is less likely to indicate an unlawful union intent. Further, as stated above, and contrary to our dissenting colleague, the Union was merely explaining the nature of the primary dispute rather than trying to coerce Macedos into ceasing doing business with County. Similarly, DiLeo's call to Vieira a few days later merely sought to determine whether County would be at the jobsite—otherwise he could not picket. Nothing in the followup call demonstrated any distinctly secondary motive.

In sum, Vieira was calling in an apparent effort to convince the Union not to engage in *lawful* primary picketing at the common worksite. When he asked the Union not to picket, the Union offered lawful reasons why it was planning to picket anyway. And, when Vieira pressed further and pleaded impossibility, the Union responded by explaining the realistic options that Macedos had available if it did not want the Union to picket County at the jobsite. As DiLeo stated, if Vieira wanted to avoid picketing at the jobsite he "would have to get somebody else because County is not paying the wages." This is an accurate statement of fact drawn ineluctably from the very nature of area-standards picketing at a common worksite under *Moore Dry Dock*, and does not establish an unlawful intent.[11]

AMENDED CONCLUSIONS OF LAW

We have amended the judge's conclusion of law to delete paragraph 4 and reletter the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 560, International Brotherhood of Teamsters, Kenvil, New Jersey, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a) and add paragraph 1(b).

"(a) Threatening Sharp Concrete Corporation with picketing, where an object thereof is to force or require Sharp Concrete Corporation to cease doing business with County Concrete Corporation, or any other person.

"(b) In any like or related manner restraining or coercing Sharp Concrete Corporation, or any other person, where an object thereof is to force or require them to cease doing business with County Concrete Corporation."

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

"(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Sharpe Concrete Cor-

conversations, the Chairman would find, in context, that these conversations are very different.

With Sharp, both points were used to intimidate and threaten the neutral. First, the alternative suppliers were listed together with a warning that the neutral would "run into a problem" and that the pickets would be placed against "you" if the neutral did not switch. In this context, it is clear that the Union was providing the names of alternative contractors in an effort to convince the neutral to cease doing business with County. Second, with Sharp, the union president pointed to the letter solely to prove his claim that he can lawfully harm the neutral; as the signator of the letter, he directly contradicted its assurances that there was no secondary intent.

Conversely, with Macedos, both points were used merely to explain the dispute. On the first point, Macedos had reached out to the Union and, without prompting, had claimed that it was impossible to switch contractors. Unions can lawfully answer such claims by giving information to the neutral about which contractors meet area standards. The question demonstrates only Macedos' apparent fear of a secondary impact—a fact which reflects nothing on the Union's intent. See *Carpenters (DWA Trade Show & Exposition Services)*, 339 NLRB 1027, 1028, 1030 (2003). Second, in contrast to Sharp, with Macedos the *Moore Dry Dock* letter was not accompanied by any "predictions" about the kind of trouble the picketing would cause the neutral employer, or any statements of a secondary intent. In this context, there is no reason to doubt the letter's plain statement of an exclusively primary purpose.

In this way, the Chairman finds that the two conversations provide a study in contrast and aptly illustrate the difference between statements of an unlawful secondary intent, and statements which focus on the lawful primary dispute.

[11] We also reject the judge's alternative rationale for finding the Macedos' violation, i.e., that the Union violated the Act by making an "unqualified threat" which did not include *Moore Dry Dock* assurances. See *Food & Commercial Workers Local 506 (Coors Distributing)*, 268 NLRB 475, 478 (1983) (citing cases), enfd. sub nom. *NLRB v. Butchers Union Local 506*, 753 F.2d 1083 (9th Cir. 1985)(mem.). Like the judge, we are aware that the "unqualified threat" doctrine has been rejected by some reviewing courts. See, e.g., *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 434–436 (D.C. Cir. 2007); *Plumbers Local 32 v. NLRB*, 912 F.2d 1108, 1110–1111 (9th Cir. 1990). But we have no need here to address those decisions or the doctrine's continuing vitality, as the *Moore Dry Dock* assurances set forth in the Union's April 26 letter comply with the doctrine.

poration, if willing, at all places where notices to employees are customarily posted."

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

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

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

WE WILL NOT threaten Sharp Concrete Corporation where an object thereof is to force Sharp Concrete Corporation to cease doing business with County Concrete Corporation, or any other person.

WE WILL NOT in any like or related manner restrain or coerce Sharp Concrete Corporation, or any other person, where an object thereof is to force or require them to cease doing business with County Concrete Corporation.

LOCAL 560, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The Board's decision can be found at http://www.nlrb.gov/case/22-CC-068160 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., 20570 or by calling (202) 273–1940.

Laura Elrashedy, Esq., for the Acting General Counsel.
Paul A. Montalbano, Esq. (Cohen, Leder, Montalbano & Grossman, LLC), for the Respondent.
Brian P. Shire, Esq. (Susanin, Widman & Brennan, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon charges in Cases 22–CC–01522 and 22–CC–068160, filed on November 12, 2010, and November 3, 2011, respectively, and upon a charge in Case 22–CC–071865, filed on January 4, 2012, and amended on February 13, 2012, an order consolidating cases, consolidated complaint, and notice of hearing issued on April 26, 2012. The complaint alleges that Local 560, International Brotherhood of Teamsters (Local 560 or Respondent), violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by threatening to picket Torcon Construction Co., Century 21 Construction Co., J Fletcher Creamer and Sons, Inc., Terminal Construction Co., Macedos Construction, LLC, and Sharp Concrete Corporation at various jobsites with an object of forcing or requiring the foregoing entities and other persons to cease handling, dealing with the products of, and doing business with County Concrete Corporation (County Concrete or the Charging Party), in furtherance of the Union's dispute with County Concrete. Respondent filed an answer denying the material allegations of the complaint.

On or about June 13, 2012, the Acting General Counsel (the General Counsel) filed a motion to transfer Case 22–CA–01522 to the National Labor Relations Board (the Board) for further proceedings, for summary default judgment and for the issuance of a Decision and Order of the Board, pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations (GC Exh. 2). The General Counsel's motion is granted, and Case 22–CA–01522 is severed and transferred to the Board for further proceedings.

This case was tried before me on June 13, 2012, in Newark, New Jersey.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits in its answer and I find that at all material times the Charging Party has been a corporation with an office and place of business in Kenvil, New Jersey, and has been engaged in supplying ready-mix concrete and related construction materials to various employers in the State of New Jersey. Respondent admits and I find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. The parties' operations and the relevant projects

County Concrete Corporation manufactures and sells ready-mix concrete, crushed sand, and gravel for construction projects, and also maintains retail yards where it sells landscape, masonry products, mulches, and other items on a wholesale and retail basis. John C. Crimi is County Concrete's president and majority stockholder. John Post is the Company's vice president of sales.

As of April 2011, County Concrete employed approximately 50 to 60 drivers. Until January 2001, all of County Concrete's employees except for sales and management were represented by Local 863, International Brotherhood of Teamsters. According to Crimi, the Company was informed in January 2001 that the employees would henceforth be represented by Local 408, International Brotherhood of Teamsters. Local 408 apparently represented the bargaining unit employees until it disclaimed interest in January 2009. At that point, Local 863 pre-

vailed in a card check certification conducted by Monsignor Gilchrest. Contract negotiations between County Concrete and Local 863 have been ongoing since then, with the last negotiating session having taken place in May 2011, but the parties have not reached a collective-bargaining agreement.

Sharp Concrete Corporation (Sharp Concrete or Sharp) does concrete work, foundation, slabs, and masonry, using concrete and materials supplied by other businesses. John Domingues owns and manages the Company. According to Domingues, Sharp Concrete had entered into an agreement with County Concrete whereby County Concrete would provide the necessary materials for Sharp Concrete's projects, whenever it was feasible to do so. Domingues testified that for over 10 years Sharp Concrete had used concrete supplied by County Concrete on its projects on a regular basis.

Macedos Construction, LLC (Macedos Construction or Macedos) is another firm which performs concrete work on construction projects. Antonio Vieira is the Company's general superintendent. Vieira testified that each year Macedos Construction generally purchases concrete from County Concrete for two or three projects. Macedos Construction has a collective-bargaining agreement with Local 560.

The instant case involves two construction projects which were ongoing during the fall of 2011. The first is a new Student Center being built at St. Peter's College in Jersey City, New Jersey. This is a seven-story concrete and masonry building; construction began in mid-November 2011 and is continuing. Sharp Concrete was engaged to do the concrete foundations, slabs, and masonry on the project. Torcon Construction is the general contractor. The second project is a group of three office buildings and a precast parking garage which is being built for Novartis in East Hanover, New Jersey. Macedos Construction is the concrete contractor for the parking garage component of the project, and had arranged to obtain the concrete it intended to use from County Concrete. Work on the garage began in September 2011, and Macedos began its work on the project in December 2011. Turner Construction is the construction manager on the Novartis project.

John C. Crimi and John Post of County Concrete testified at the hearing for the General Counsel, as did John Domingues of Sharp Concrete and Antonio Vieira of Macedos Construction. Paul Parmentola, vice president and construction executive at Turner Construction, also testified pursuant to a subpoena issued by the General Counsel. Respondent did not present any witnesses.

2. The dispute between Local 560 and County Concrete

Since at least the spring of 2011, Local 560 has been engaged in a dispute with County Concrete, contending that County Concrete has failed to pay its employees area standards wages and benefits. On April 26, 2011, Anthony Valdner, Local 560's president, sent a letter to the Building Contractors Association of New Jersey, the Associated General Contractors of New Jersey, the Utility and Transportation Contractors Association, and a number of individual firms describing its dispute with County Concrete and related activities Local 560 might possibly undertake. The letter states as follows:

Dear AGC, BCA, UTCA and Independent Construction Contractors and Subcontractors:

Local 560, IBT is currently involved in efforts to protect area standards of wages and benefits paid to drivers in the redi-mix concrete delivery industry.

County Concrete Corporation is attempting to seriously undermine redi-mix delivery area standards. Though County Concrete Corporation has a collective bargaining relationship with Local 863, I.B.T., the parties have been without a contract for over a year due to County Concrete's offer of substandard wages and benefits. County Concrete has attempted to have Local 863 decertified through a petition at the NLRB. The County Concrete employees overwhelmingly voted to continue their membership in and representation by Local 863. Unfortunately, County Concrete has not gotten the message that its employees are demanding to be paid area standards and are willing to go out on strike to compel County Concrete to pay area standard wages and benefits in similar fashion as other unionized redi-mix drivers. Drawing upon Concrete's history of intransigence, it is not expected any time soon that they will reach agreement on economic terms for a contract, and strike[s] and picketing may be expected. While County Concrete and Local 863 continue to seek to resolve their differences, Local 560 will not stand actionless as County Concrete continues to operate at substandard wages and economic benefits, with affect to destroy area standard wages and economic benefits.

Local 560 recently settled with the National Labor Relations Board a claim brought by County Concrete. The settlement specifically provided acknowledgement by the NLRB, as well as County Concrete, that by agreeing to settle the charge, Local 560 did not admit it engaged in any conduct that was in violation of the National Labor Relations Act. You as a company executive understand that it is often a wiser and more prudent course to settle legal claim[s] rather than pursue costly and time consuming litigation.

The settlement does not in any manner limit Local 560 from engaging in an energetic campaign focused against County Concrete which will have the object to protect the area standards of wages and economic benefits earned by area redi-mix drivers. This campaign has several different facets, one of which includes area standards picketing.

So that there can be no claim of confusion or assertion of misunderstanding of any future conversations with Local 560 Business Agents, Local 560 advises that all "threats to picket" are made with, and actual picketing, will be conducted in accordance with, *Moore Dry Dock* Standards for Picketing at a Secondary Site, as indicated below:

1. Picketing will clearly disclose that the dispute is with County Concrete Corp. for its failure to pay Area Standards.
2. Picketing will be conducted at times County Concrete is "engaged in its normal business" at the Secondary Site.

3. Picketing will be conducted at times County Concrete is "located" or "present" on the Secondary employer's site.
4. Picketing will be limited to places reasonably close to the sites of the dispute, with due regard to reserve gates and property access.

Local 560's energies and vigorous activities will be persistent and will continue until County Concrete Corp. commences to pay its redi-mix drivers Area Standards when making deliveries in Local 560 geographic territory.

Local 560 does not seek to enmesh your company in its dispute with County Concrete. Whichever redi-mix company you decide to utilize, we recommend prudence be taken to determine what rates of pay and benefits the Company pays its drivers.

If you have any questions in regard to the meaning of the *Moore Dry Dock* Standards, you should contact the National Labor Relations Board or your own counsel. Because of previous claims of improper statements being made by Local 560 Business Representatives, Local 560 Business Representatives are under instruction that they shall not add to, supplement, or explain this letter to any contractor, and you are specifically advised that any such statements are not operative or authorized such that they may not be claimed to be made against Local 560's interests.

Respectfully,

Anthony Valdner
President

The evidence establishes that this letter was widely disseminated. Crimi testified that he had seen it, and had discussed the area standards issue with Jack Macedos of Macedos Construction on numerous occasions during the past 2o years. Parmentola testified that he had heard about the letter from Nordic Concrete, which had provided a copy to him, and that he had also discussed the area standards dispute with James Martins of Macedos Construction. Post also testified that he was aware of the letter and had discussed it with Parmentola.

General Counsel stipulated at the hearing that Local 560 was involved in an area standards dispute with County Concrete.[1]

3. Facts relevant to the St. Peter's College project and Sharp Concrete

Domingues and Post testified that on November 1, 2011, they attended a meeting arranged by the Hudson County Building Trades Council regarding the Student Center project at St. Peter's College. Domingues was invited to attend the meeting by Roy Porter, the superintendent for Torcon Construction, the general contractor on the project. Domingues in turn invited Post to attend. Representatives from other contractors on the project and from the Building Trades Association were present as well. Each person attending the meeting introduced themselves and explained their organization's role of on the project. Repre-sentatives of contractors identified the suppliers and subcontractors they would be using on the project to the Building Trades Council. Toward the end of the meeting, Pat, a representative of the Building Trades Association, told the group that Anthony Valdner of Local 560 had not been able to attend, and asked everyone to call Valdner later. Pat gave out Valdner's phone number, and the meeting ended.

Domingues and Post then returned to Domingues' office together and called Valdner. Domingues recorded this conversation, which proceeded as follows:

DOMINGUES: Hi Tony, this is John from Sharp Concrete.

VALDNER: Yes. Hi, how are you?

DOMINGUES: Good.

VALDNER: What can I do for you?

DOMINGUES: Pat told me to give you a call and just touch base with you. We are doing the concrete over at St. Peter's in Jersey City.

VALDNER: Right.

[Inaudible.]

VALDNER: County Concrete is no good.

DOMINGUES: They are no good.

VALDNER: No good. No good. I will be putting a picket line against you . . . an informational picket line. They are non-union. They don't pay the area standards.

DOMINGUES: Okay.

VALDNER: They don't pay the area standards. Before you run into a problem. Alright? You have Eastern, you have Weldon, you have Colonial, you have Service.[2]

DOMINGUES: Okay.

VALDNER: You have Crane Concrete out of Milisevik. Colonial is out of Newark. Eastern is out of Jersey City. [inaudible.]

DOMINGUES: I am going to do this, only because I went in with County's price. They have done a couple of jobs with us.

VALDNER: Right.

DOMINGUES: I am going to call County and I will have them give you a call. I thought they were union.

VALDNER: No they are not union and they don't pay the area standards. They have no signed contract with 863. For over 2 years I have been battling them with 863. They have been torn off a lot of jobs, John. They don't pay the area standards. We went before the Labor Board and we can picket the jobs. I will send you a letter and everything that my lawyer wrote up. They are not good. They don't pay the area standards and that's what I will picket them. Area standards.

DOMINGUES: Okay. I am going to call my salesman over there if that's okay and I will have him . . . .

VALDNER: That's fine with me. He's union and this and that. I'm telling you. I will put up an informational picket line and the trades won't cross it. And I'm not do-

[1] The General Counsel did not stipulate that Local 560's activities were solely motivated by a permissible area standards notification objective, as Respondent claims in its posthearing brief (Tr. 44).

[2] These companies all have contractual relationships with the Union.

ing anything wrong by doing that. The Labor Board told me that I can do that. Okay, sir?

DOMINGUES: Okay, my man. I will let you know.

VALDNER: Bye-bye.

DOMINGUES: Thanks.[3]

Valdner later faxed Domingues a copy of his April 26, 2011 letter regarding the area standards dispute with County Concrete.

Domingues testified that he later called Roy Porter of Torcon Construction, described his conversation with Valdner, and asked Porter whether he should continue to use County Concrete. According to Domingues, Porter said no, and told Domingues that he had to speak with his office. Porter told Domingues that he needed to submit another concrete supplier as soon as possible, because they could not lose time on the job. Domingues testified that instead of County Concrete he obtained the concrete for the St. Peter's College job from Service, a supplier suggested by Valdner during their conversation whose employees are represented by Respondent.

4. Facts relevant to the Novartis Project and Macedos Construction

Work on the Novartis project in East Hanover began in April 2011. In September or October 2001, Dave Critchley, president of the Morris County Building Trades Association, arranged for a meeting between Paul Parmentola of Turner Construction and Valdner regarding the outstanding dispute between Local 560 and County Concrete. At that point the last of the project's four buildings was not yet ready for concrete work to begin, and Macedos Construction had not selected a concrete supplier. Parmentola testified that he met Valdner for the first time at this meeting. According to Parmentola, Valdner told him that Local 560 had an issue with County Concrete's failure to pay its drivers area standards wages and benefits. Valdner also gave Parmentola a copy of Local 560's April 26, 2011 letter to the employer associations and independent firms.

Subsequently, in mid-December 2011, another meeting regarding Local 560's dispute with County Concrete was called by the Morris County Building Trades Association. Parmentola attended this meeting with Bill DiPasquale, also from Turner Construction, Critchley, Valdner, another Local 560 representative named Joe, and Lou Candora, also from the Building Trades Association.[4] Parmentola testified that at this meeting Valdner again described Local 560's dispute with County Concrete, contending that County Concrete's drivers were not being paid area standards wages. Valdner said that he wanted to bring the issue to Parmentola's attention. The participants then discussed two possibilities—ensuring that the County Concrete drivers were paid a higher wage in line with area standards wages and benefits, and engaging a company other than County Concrete provide the concrete for the remainder of the Novartis project. Parmentola testified that Valdner said that a company other than County Concrete would pay the drivers are standards wages, but could not recall Valdner mentioning any specific company. Valdner stated that the dispute could be resolved if County Concrete's drivers were paid area standards wages or if another company, whose drivers were paid area standards wages, was selected to supply the concrete. Valdner stated that if the dispute was not resolved Local 560 could engage in informational picketing. At this meeting, Valdner also provided Parmentola with another copy of his April 26, 2011 letter.

Antonio Vieira testified that Macedos Construction began working on the Novartis project in late December 2011, with County Concrete delivering the concrete as per the agreement between the companies. Vieira testified that after Macedos began work, his superintendent on the job told him that Local 560 intended to picket the job on the Tuesday after New Year's Day. Vieira then called Joe DiLeo of Local 560 and left him a message. Vieira testified that when DiLeo called him back, Vieira asked why Local 560 intended to picket. DiLeo told Vieira that if County Concrete did not pay Local 560 wages the union would picket the job. Vieira responded that Macedos had to use County Concrete at that point, because the materials (a special colored concrete, stone and sand) had already been purchased for the job, there had been months of mockups and other preparation, and everything was ready for the work to begin. DiLeo told Vieira that Macedos had to get another concrete supplier, because County Concrete was not paying area standards wages. DiLeo suggested specific concrete suppliers which would pay their employees the appropriate wages, including Eastern, Weldon, and Clayton. DiLeo told Vieira that if he did not use a concrete supplier that paid the appropriate wages, Local 560 would picket the job the next day.

Vieira then asked DiLeo why Local 560 was picking on Macedos, when County Concrete was supplying concrete for Nordic Construction on the Novartis project. DiLeo responded that Nordic had agreed that it would not use County Concrete again on its jobs. DiLeo then said that County Concrete would have to pay an extra $15 per hour to meet the Local 560 wage rates. Vieira responded that Macedos needed to use County Concrete because of all the time and money already invested with them in the project, and suggested to DiLeo that Macedos pay the difference between the County Concrete and Local 560 wage rates. DiLeo refused, saying that County Concrete had to pay the difference because the additional amounts would be contributed to benefit funds, and reiterated that if County Concrete did not pay the appropriate wage rates, Macedos had to use a different contractor. Vieira then told DiLeo that Macedos would need time to bring in a different concrete supplier, and asked whether Macedos could begin the job with County Concrete until they made the necessary arrangements with another company. DiLeo responded that if Macedos didn't find a different concrete supplier Local 560 would picket the job, but said that he would ask whether Macedos could use County Concrete until they made the necessary arrangements with another supplier. Vieira also told DiLeo that he was concerned that another concrete supplier would take advantage of Macedos given the last-minute nature of the situation. DiLeo responded that he would speak to another concrete supplier and

[3] This account of Domingues and Valdner's conversation was taken from the transcript prepared by the General Counsel and in evidence as GC Exh. 3(b). No party has raised any objection to the accuracy of the transcript, which is consistent with the recording of the conversation (GC Exh. 3(a)) in all material respects.

[4] Several of these names are spelled phonetically.

"get them to do the right thing" if Macedos chose them. Vieira said that they had to think about the situation over the weekend, and DiLeo responded that if he did not hear from Macedos on Tuesday the Union would picket.[5]

Vieira testified that on the next Tuesday DiLeo called him. DiLeo told Vieira that he had spoken to Eastern, one of the alternative suppliers he had suggested, and Eastern had reported that they had not heard from Macedos. Vieira said that Macedos was still thinking about their options and deciding what they were going to do. Vieira then contacted Macedos' attorney.

Local 560 did apparently picket the Novartis jobsite beginning on January 18, 2012. There is no allegation in this case that the January 2012 picketing was unlawful.

III. ANALYSIS AND CONCLUSIONS

A. General Principles and the Positions of the Parties

Section 8(b)(4)(ii)(B) prohibits labor organizations and their representatives from threatening, coercing, or restraining any person engaged in commerce, "where an object thereof is forcing or requiring any person to cease doing business with any other person." It is well settled that an unlawful secondary objective need not be the sole motivation for the union's conduct; so long as *an* unlawful object exists, prohibited conduct in furtherance of that objective violates Section 8(b)(4)(ii)(B). See, e.g., *General Service Employees Local 73 (Allied Security, Inc.)*, 239 NLRB 295, 303 fn. 3 (1978). In addition, the Board has held that an "unqualified" threat to picket a neutral employer's jobsite where the primary employer is also working violates Section 8(b)(4)(ii)(B), absent assurances that picketing will be conducted in accordance with the standards articulated in *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).[6] *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 749 (2004), enfd. 251 Fed. Appx. 101 (3d Cir. 2007); *Ironworkers Local 433 (United Steel)*, 280 NLRB 1325 fn. 1, 1331–1333 (1986), enf. denied 850 F.2d 531 (9th Cir. 1988); see also *Teamsters Local 456 (Peckham Materials)*, 307 NLRB 612, 619 (1992) (discussing cases). However, even compliance with the *Moore Dry Dock* standards does not preclude a finding of unlawful picketing where there is independent evidence of a secondary objective. *Teamsters Local 126 (Ready Mixed Concrete, Inc.),* 200 NLRB 253 (1972).

The General Counsel and the Charging Party contend that Local 560 violated Section 8(b)(4)(ii)(B) when Valdner threatened Domingues of Sharp Concrete during their November 1, 2011 phone conversation, and when DiLeo threatened Vieira of Macedos Construction during their phone conversation on or about December 30, 2011. The General Counsel and the Charging Party argue that the record contains sufficient independent evidence of Local 560's secondary objective to establish that Valdner and DiLeo's statements were threats violating Section 8(b)(4)(ii)(B). However, the General Counsel further contends that even if no additional evidence of secondary objective existed, Valdner and DiLeo's threats to picket were unqualified by affirmative assurances that picketing would comply with *Moore Dry Dock* standards, and were therefore unlawful.[7]

Respondent Local 560 argues that Valdner and DiLeo's statements were not unlawful threats of picketing. Local 560 argues that its April 26, 2011 letter, which discussed picketing in the context of the *Moore Dry Dock* standards, effectively qualified Valdner and DiLeo's statements to Domingues and Vieira, so that the statements themselves were not unlawful. Local 560 further argues that the Board should revisit and ultimately reject the principle that a union representative's threat to picket generates a presumption, whether rebuttable or not, that the union will engage in unlawful secondary activity absent an affirmative assurance that picketing will be conducted in accordance with *Moore Dry Dock* standards. Local 560 contends that the Board should abandon this presumption, citing the opinion of the District of Columbia Circuit in *Sheet Metal Workers Local 15 v. NLRB*, 49 F.3d 419, 434–436 (2007), and of the Ninth Circuit in *Journeymen Local 32 v. NLRB*, 912 F.2d 1108, 1110–1111 (1990), both of which rejected it. The General Counsel also argues that the presumption should be abandoned based upon the opinions of the District of Columbia and Ninth Circuits in these cases.

B. Local 560 Violated Section 8(b)(4)(ii)(B) by Threatening Sharp Concrete and Macedos Construction with Picketing, with the Object of Forcing or Requiring them to Cease Doing Business with County Concrete

I find that Local 560 violated Section 8(b)(4)(ii)(B) by threatening Sharp Concrete and Macedos Construction with picketing in furtherance of an unlawful secondary objective—forcing or requiring both companies to cease doing business with County Concrete, with whom Local 560 had an area standards dispute. I find that the record contains adequate evidence of a secondary motivation to determine that the statements were unlawful, without recourse to the presumption that unqualified threats to picket, without assurances of compliance with *Moore Dry Dock* standards, violate Section 8(b)(4)(ii)(B).

1. Valdner's statements to Domingues regarding the St. Peter's College jobsite

The evidence establishes that Valdner unlawfully threatened Domingues with picketing in furtherance of a secondary objective during their conversation on November 1, 2011. After determining that Domingues intended to use County Concrete as Sharp's supplier for the St. Peter's College job, Valdner

[5] DiLeo did not testify at the hearing.

[6] Under *Moore Dry Dock*, picketing at a common situs must be strictly limited to times when the situs of the dispute is located on the secondary employer's premises, the primary employer must be engaged in its normal business at the situs, the picketing must be limited to places reasonably close to the situs of the dispute, and the picketing must clearly disclose that the dispute is with the primary employer. 92 NLRB at 549.

[7] The Charging Party also asserts that Local 560 violated Sec. 8(b)(4)(ii)(B) by picketing at the Novartis jobsite in early January 2012. However, the consolidated complaint does not contain any allegations of unlawful picketing, and the General Counsel does not assert that Local 560 violated the Act in this manner. As a result, I decline to make any findings or conclusions on this issue.

immediately stated that he would be "putting a picket line against you." The "you" in Valdner's statement clearly refers to Sharp, and not to County Concrete. While mentioning area standards issues, Valdner also told Domingues that County Concrete was "not union," and suggested alternative suppliers which have contractual relationships with the Union. Valdner went on to inform Domingues that he would "put up an informational picket line and the trades won't cross it." It is clear from has statements that Valdner intended to convey to Domingues that his only means of avoiding picketing which, according to Valdner, would bring a halt to work at the site, was to select a concrete supplier which had a contractual relationship with the Union in lieu of County Concrete. This constitutes significant evidence of an unlawful secondary objective. See *General Service Employees Local 73 (Allied Security)*, 239 NLRB at 30–307 (business agent's statement that "there were about 80 security firms that met area standards in the phone book" during conversation with neutral representative regarding "possible picketing" evidence of unlawful objective); *Electrical Workers Local 369 (Garst-Receveur Construction Co.)*, 229 NLRB 68, 72–73 (1977), enfd. 609 F.2d 266 (6th Cir. 1979) (union agent's statement that "[i]f the job was run 100 percent union and then if [the primary employer] is off this job, then everything can be cleared up" sufficient to establish unlawful secondary objective). The evidence establishes, of course, that Valdner referred to informational picketing and the area standards nature of the Union's dispute with County Concrete. However, given Valdner's clear requirement that Domingues select another, unionized, concrete supplier or face a picket line which, according to Valdner, "the trades won't cross," these allusions are ineffective to immunize his overall remarks from a finding of prohibited secondary motivation.

I further find that Respondent's April 26, 2011 letter regarding its compliance with *Moore Dry Dock* standards during future picketing is insufficient to establish that Valdner's remarks were in fact permissible. Although the evidence establishes that Valdner faxed a copy of the letter to Domingues after their November 1, 2011 conversation, the law is clear that subsequent or concurrent compliance with *Moore Dry Dock* standards is insufficient to excuse otherwise unlawful activity where there is direct evidence of a secondary objective. See, e.g., *Service Employees Local 254 (Women & Infants Hospital)*, 324 NLRB 743 (1997) (evidence regarding compliance with *Moore Dry Dock* standards during picketing irrelevant in light direct evidence of secondary objective); *General Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB at 254–255 (compliance with *Moore Dry Dock* standards "does not immunize a union's picketing and other conduct" where record evidence reveals a secondary objective). As a result, the April 26, 2011 letter providing assurances that any picketing of County Concrete will be conducted in compliance with *Moore Dry Dock* standards does not establish that Valdner's unrebutted statements to Domingues, which clearly evince a prohibited secondary objective, were lawful.

In addition, as argued by the General Counsel, the April 26, 2011 letter is insufficient under the relevant case law to operate as a repudiation of Valdner's unlawful threats of picketing. As the General Counsel notes, repudiation must be "timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed legal conduct." *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (internal quotations omitted). In addition, the repudiation must be publicized adequately and contain assurances that no future coercion or interference will occur, and there must be no additional proscribed conduct after publication. *Passavant Memorial Area Hospital*, 237 NLRB at 138–139. Although Respondent's April 26, 2011 letter was disseminated, it does not explicitly repudiate any specifically identified wrongdoing, and in fact contains language stating that Respondent does not admit to any violation of the Act.[8] See *Holly Farms Corp.*, 311 NLRB 273, 274–275 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995) (alleged repudiation of unlawful wage increase ineffective where respondent did not "admit to any wrongdoing"). Indeed, the April 26, 2011 letter is not even specific to any particular jobsite, project, or statement of Respondent's representatives. In addition, DiLeo's unlawful threat to Vieira regarding Macedos Construction's activities at the Novartis jobsite, as discussed below, establishes additional proscribed conduct after the April 26, 2011 letter was sent to Domingues on or about November 1, 2011. As a result, I find that Valdner's faxing the April 26, 2011 letter to Domingues was insufficient to "cure" the unlawful threat Valdner made earlier.

For all of the foregoing reasons, I find that Valdner threatened Domingues on November 1, 2011, with picketing with the prohibited secondary objective of forcing or requiring Sharp Concrete to cease doing business with County Concrete. I therefore find that Respondent's threat to Domingues violated Section 8(b)(4)(ii)(B).

2. DiLeo's statements to Vieira regarding the Novartis jobsite

I likewise find independent evidence sufficient to establish an unlawful secondary objective with respect to DiLeo's statements to Vieira in late December 2011 regarding Macedos Con-struction's activities at the Novartis jobsite. I credit Vieira's unrebutted testimony that DiLeo insisted that Macedos terminate its agreement with County Concrete and engage a supplier which had a contractual relationship with the Union in order to avoid picketing at the jobsite. *General Service Employees Local 73 (Allied Security)*, 239 NLRB at 306–307; *Electrical Workers Local 369 (Garst-Receveur Construction Co.)*, 229 NLRB at 72–73. At least one of the contractors suggested by DiLeo was also mentioned by Valdner to Domingues during their November 1, 2011 conversation, discussed above. In addition, after Vieira asked DiLeo why Local 560 was specifically targeting Macedos when other contractors on the jobsite were using County Concrete, DiLeo responded that those other contractors had agreed not to use County Concrete in the future. Finally, when Vieira expressed concern about

[8] Specifically, the April 26, 2011 letter states that Local 560 "did not admit it engaged in any conduct that was in violation of the National Labor Relations Act" in connection with the settlement of a previous unfair labor practice charge filed against it by County Concrete, and asserts that statements made by Local 560's representatives regarding the letter "may not be claimed to be made against Local 560's interests."

finding another supplier on such short notice, DiLeo offered to contact them and get them to "do the right thing for Macedos." All of these statements evince a prohibited secondary object of forcing or requiring Macedos to cease doing business with County Concrete.

The events which took place after Vieira and DiLeo's initial conversation also evince an unlawful secondary objective on Respondent's part. According to Vieira's unrebutted testimony, DiLeo next called him after hearing from one of the alternate suppliers he had suggested that Vieira had not yet contacted them, and threatened again to picket the jobsite. In fact, when Vieira went ahead and used County Concrete, Respondent did so. Overall, the evidence is more than sufficient to establish that DiLeo's remarks were made with the unlawful secondary objective of forcing Macedos Construction to cease doing business with County Concrete. As a result, DiLeo's statements during his conversation with Vieira constituted an unlawful threat to picket in violation of Section 8(b)(4)(ii)(B).

3. Valdner and DiLeo's statements were unqualified threats to picket in violation of Section 8(b)(4)(ii)(B)

As discussed above, there is adequate independent evidence of a secondary objective based upon the content of the conversations and the surrounding circumstances to determine that Valdner and DiLeo's statements to Domingues and Vieira violated Section 8(b)(4)(ii)(B). However, even without additional evidence of a secondary motivation, I would find that the statements were unqualified threats to picket, devoid of assurances that Respondent would comply with the *Moore Dry Dock* criteria, and therefore unlawful on that basis as well. See *Electrical Workers Local 98 (MCF Services)*, 342 NLRB at 741, 752; *Iron Workers Local 433 (United Steel)*, 280 NLRB at 1325 fn. 1, 1333. I am aware, of course, that the District of Columbia and Ninth Circuits have disavowed the Board's presumption that threats of picketing are unlawful unless accompanied by affirmative assurances that such picketing will comply with the *Moore Dry Dock* requirements. These circuits have concluded that the presumption "is without foundation in the Act, relevant case law or any general legal principles," and have found that the Board's holdings in such cases were "irrational and beyond the Board's authority." *Journeymen Local 32*, 912 F.2d at 1110, quoting *NLRB v. Iron Workers Local 433*, 850 F.2d 551, 557 (9th Cir. 1988); *Sheet Metal Workers Local 15*, 491 F.3d at 435. Nevertheless, the presumption constitutes existing Board law which I am required to apply. See *Electrical Workers Local 98 (MCF Services)*, 342 NLRB at 740, 752; see also *Laborers Local 79 (JMH Development)*, 354 NLRB 158 (2009). In addition, for the reasons discussed in section III,(B),(1) above, I would not find Respondent's April 26, 2011 letter sufficient to rebut the presumption. As a result, even if the record did not contain independent evidence of a secondary objective, I would find that Valdner and DiLeo's statements violated Section 8(b)(4)(ii)(B) as unqualified threats to picket Sharp Concrete and Macedos Construction.

For all of the foregoing reasons, I find that Respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening Sharp Concrete and Macedos Construction, on November 1, 2011, and in late December 2011, respectively, with picketing, with the secondary objective of forcing the companies to cease doing business with County Concrete.

CONCLUSIONS OF LAW

1. County Concrete Corporation, Sharp Concrete Corporation, and Macedos Construction, LLC, are employers and persons engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Local 560, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to picket Sharp Concrete Corporation at the St. Peter's College jobsite with an object of forcing or requiring Sharp Concrete Corporation to cease doing business with County Concrete Corporation on November 1, 2011, Respondent violated Section 8(b)(4)(ii)(B) of the Act.

4. By threatening to picket Macedos Construction, LLC at the Novartis jobsite with an object of forcing or requiring Macedos Construction, LLC, to cease doing business with County Concrete Corporation on or about December 30, 2011, Respondent violated Section 8(b)(4)(ii)(B) of the Act.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7), and Section 8(b)(4)(ii)(B), of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(b)(4)(ii)(B) of the Act, I shall recommend that it be ordered to cease and desist therefrom and post appropriate notices to effectuate the Act's purposes.

[Recommended Order omitted from publication.]