

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 357, AFL-CIO**

and

Case 28-CC-115255

**DESERT SUN ENTERPRISES LIMITED d/b/a
CONVENTION TECHNICAL SERVICES**

**GENERAL COUNSEL'S BRIEF
IN SUPPORT OF LIMITED EXCEPTIONS**

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I. INTRODUCTION

In this case, under current National Labor Relations Board (Board) law, General Counsel issued a Complaint alleging that International Brotherhood of Electrical Workers, Local Union 357, AFL-CIO (Respondent) violated Section 8(b)(4)(ii)(B) of the Act by sending a strike sanction request letter to a neutral employer, the Las Vegas Convention and Visitors Authority (LVCVA), without providing assurances that any strike-related activity that might occur would comport with the standards set forth in *Moore Dry Dock*.¹

Although Respondent's Answer denied the allegations contained in General Counsel's Complaint, after the opening of the record in a hearing on this matter, Counsel for the General Counsel (CGC) and Respondent entered into a stipulation of facts wherein Respondent agreed to facts constituting an admission to the key allegation in the Complaint.² (ALJD p. 2, ll. 45-

¹ *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950) (The *Moore Dry Dock* criteria are: "(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 picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.").

² Charging Party was not a party to the stipulation of facts.

47; p. 3, ll. 1-13, ll.32-33).³ This stipulation was accepted by the Administrative Law Judge (ALJ) and entered into evidence. Thereafter, CGC made an oral motion for summary judgment, which was unopposed by Respondent and granted by the ALJ to put the issue before the Board. (ALJD p. 3 at ll. 33-35 and fn. 1).

Based on the stipulated facts, exhibits, and findings, CGC and Respondent urged the ALJ to find that Respondent had not engaged in conduct which violated Section 8(b)(4)(ii)(B) of the Act and, accordingly, to dismiss the Complaint. (ALJD p.4, ll.31-33). The ALJ, noting that he was required to follow current Board law, declined to dismiss the Complaint and issued a Decision finding that Respondent had engaged in an unfair labor practice in violation of Section 8(b)(4)(ii)(B) of the Act by not giving specific assurances to the Charging Party, a neutral employer, that Respondent would adhere to *Moore Dry Dock* standards in any picketing of its primary employer at a common situs. The ALJ further ordered that Respondent cease and desist from engaging in such conduct and that Respondent post an appropriate notice to employees stating that it would cease and desist from engaging in such conduct. General Counsel respectfully excepts to the ALJ's finding that Respondent's conduct constituted a violation of the Act, and to the remedies prescribed by the ALJ.

General Counsel urges the Board to overrule current Board law, adopt the precedent of the United States Courts of Appeals for Ninth and D.C. Circuits with respect to *Moore Dry Dock* assurances, and find that Respondent's conduct does not constitute a violation of Section 8(b)(4)(ii)(B) of the Act, for the reasons set forth below. By doing so, Board law will be brought into conformity with the above-mentioned circuits and provide a more reasonable guideline for unions seeking to engage in lawful picketing while providing due notice to neutral employers.

³ ALJD will hereinafter refer to the Decision of the Administrative Law Judge.

II. FACTS

Respondent is a labor organization within the meaning of Section 2(5) of the Act. (ALJD p. 3, ll. 22-23). The LVCVA is a government entity that manages the Las Vegas Convention Center (LVCC) and is a person within the meaning of Section 2(1) and 8(b)(4) of the Act. (ALJD p. 3, ll. 15-17). On October 9, 2013, Respondent learned from its Assistant Business Manager Max Carter that Desert Sun Enterprises Limited d/b/a Convention Technical Services (Charging Party) was performing work on an exposition at the LVCC. (ALJD p. 2, ll. 43-46). Respondent believed that Charging Party had failed to pay area standard wages and benefits (ALJD p. 2, ll. 46-47) and, in response, drafted and sent the following letter requesting a strike sanction from the Southern Nevada Building and Construction Trades Council against Charging Party (ALJD p. 3, ll. 2-4):

Dear Darren,

Please be advised that Local Union #357 of the International Brotherhood of electrical [sic] Workers is requesting a strike sanction against **Convention Technical Services**. This is for any and all jobs because of not paying area standards. (Original emphasis.) Your cooperation in this matter would be greatly appreciated.

Sincerely,
/s/ Al Davis
Al Davis
Business Manager/Financial Secretary
IBEW Local #357
cc. LVCVA Board Members

(ALJD p.3, ll. 19-30).

This letter offered no assurances that any potential picketing would adhere to the standards in *Moore Dry Dock*. (ALJD p.3 ll. 10-14). Respondent also sent a copy of this letter to “selected members of the Board of Directors for the LVCVA.” (ALJD p. 3, ll. 4-5).

III. ARGUMENT

A. Section 8(b)(4)(ii)(B) of the Act: The Analytical Framework

Section 8(b)(4)(ii)(B) of the Act provides that it is an unfair labor practice for a union to threaten, coerce, or restrain any person if an object thereof is to require any person to cease doing business with any other person. As recognized by the Supreme Court, “[t]his provision could not be literally construed; otherwise it would ban most strikes considered to be lawful, so-called primary activity.”⁴ The Board and the courts have thus interpreted Section 8(b)(4)(ii)(B) to generally prohibit only activity directed at a secondary employer for a prohibited purpose, such as attempting to cause the secondary employer to cease its business relationship with the primary employer.⁵ Determining whether union activity is unlawfully directed at secondary, or “neutral,” employers presents particularly difficult questions where the primary and neutral employers are both working at a common situs. In these situations, the Board will apply the *Moore Dry Dock* criteria to help determine whether common situs picketing is lawfully directed at the primary.⁶ If a union fails to fully satisfy these criteria, a strong, though not irrebuttable, presumption is established that a union’s common situs activity is unlawfully directed at the secondary employer.⁷

⁴ *Electrical Workers, IUE Local 761 v. NLRB (General Electric Co.)*, 366 U.S. 667, 672 (1961).

⁵ See, e.g., *id.* at 672-73 (citing *Local 1976, United Brotherhood of Carpenters, etc. v. National Labor Relations Board (Sand Door)*, 357 U.S. 93 (1958)); *Allied Mechanical Services, Inc.*, 357 NLRB No. 101, slip op. at 7-8 (Oct. 25, 2011), *enf. denied N.L.R.B. v. Allied Mech. Servs., Inc.*, 734 F.3d 486 (6th Cir. 2013); *Oil, Chemical, & Atomic Workers, Local 1-591 (Burlington Northern Railroad)*, 325 NLRB 324, 326-27 (1998).

⁶ *Moore Dry Dock*, 92 NLRB at 549.

⁷ *Sheet Metal Workers, Local 7 (Andy J. Egan Co.)*, 345 NLRB 1322, 1324 (2005) (“Although failure to comply with one or more of the *Moore Dry Dock* standards does not constitute a per se violation of the Act, it creates a strong but rebuttable presumption that the picketing had an unlawful secondary object.”); *Pacific Northwest District Council of Carpenters (DWA Trade Show & Exposition Services)*, 339 NLRB 1027, 1028-29 (2003).

Section 8(b)(4)(ii)(B) has further been interpreted to prohibit not only certain types of picketing, but also threats to engage in unlawful picketing.⁸ The Board has extended that interpretation to hold that *unqualified* threats to engage in common situs picketing that are directed to neutral employers are unlawful.⁹ A threat will be considered *unqualified*, and thus unlawful, if it contains no affirmative assurances that any future picketing will be conducted in accordance with *Moore Dry Dock* and other relevant standards.¹⁰

B. Board's Recent Precedent with Respect to Threats to Picket

The Board currently takes an exceptionally broad view of what constitutes an unlawful threat to picket under Section 8(b)(4)(ii)(B), and what threats require assurances that any picketing will be conducted lawfully. The Board finds unlawful not only direct or thinly-veiled threats to picket neutrals, but also statements that merely inform neutrals of prospective action against primary employers at the neutrals' jobsite.¹¹ An example of this

⁸ E.g., *Metropolitan Regional Council of Carpenters (Adam-Bickel Associates, Inc.)*, 351 NLRB 1007, 1011 (2007) (adopting ALJ's analysis without discussion), *enfd.* 316 F. App'x 150 (3d. Cir. 2009).

⁹ *Teamsters, Local 456 (Peckham Materials Corp.)*, 307 NLRB 612, 612 n.2, 619 (1992) (affirming ALJ's discussion regarding threats to picket) and cases cited therein; *General Drivers, Chauffeurs, & Helpers, Local 886 (Stephen's Co.)*, 133 NLRB 1393, 1395, 1397-99 (1961).

¹⁰ *Iron Workers Local 433 (United Steel)*, 280 NLRB 1325, 1332 (1986), *enf. denied* 850 F.2d 551 (9th Cir. 1988); *Sheet Metal Workers Local 418 (Young Plumbing)*, 227 NLRB 300, 312 (1976), *enfd.* 568 F.2d 773 (4th Cir. 1978) (unpublished table decision).

¹¹ Earlier Board cases did, at one point, try to make a distinction between "mere notice" to a neutral employer of prospective action at a neutral jobsite and a "threat" that required a qualification that picketing would be done in a lawful manner. See, e.g., *Construction, Building Materials, Etc., Local 83 (Marshall & Haas)*, 133 NLRB 1144, 1145-46 (1961) (finding that union representative's statement to neutral contractor that a subcontractor might be "in trouble" and that he had given subcontractor "24 hours in which to 'straighten out'" was "the mere giving of notice of prospective strike action against a subcontractor to the prime contractor," and not an unlawful threat"); *Electrical Workers IBEW Local 38 (Cleveland Electro Metals Co.)*, 221 NLRB 1073, 1074 (1975) (union's statement to neutral that there might be a picket, made in response to a question about the primary employer, found to be lawful). However, in later cases, the Board adopted a more stringent approach, to the extent that the Board no longer distinguished unlawful threats from mere notice of potential picketing sent to neutral employers. See, e.g., *Iron Workers Local 433 (United Steel)*, 280 NLRB at 1325 n.1 (limiting holding in *Cleveland Electro Metals* to the specific facts of that case and holding that, when the record does not contain affirmative evidence that primary will be the only employer on the jobsite, "threats to picket" must be affirmatively qualified by *Moore Dry Dock*); *Sheet Metal Workers, Local 2 (Hall Refrigeration Sales & Service)*, 203 NLRB 954, 956 (1973) (distinguishing *Marshall & Haas* to find that statements at issue went beyond mere notice of prospective action against the primary employer because union did not clearly indicate its dispute was with the primary employer and did not further indicate that it was only demanding action from the primary employer). Any doubt as to the continuing vitality of these cases is

expansive definition can be seen in the Board’s decision in *Sheet Metal Workers Local15 (Brandon Regional Medical Center)*.¹² In that case, the union sent a letter to Beall’s, a neutral employer, informing Beall’s of its ongoing labor dispute with Energy Air, the primary employer who was doing work at a jobsite on Beall’s property. The letter concluded that, in light of the ongoing labor dispute, “[t]he union will be compelled to publicize [its] dispute with Energy Air by way of leafleting, protesting, and *the possibility of picketing at the sites.*”¹³ The ALJ found that this letter was a threat to engage in secondary activity, and that because the union did not qualify its threat by stating that any picketing would be conducted in conformity with *Moore Dry Dock* and other applicable standards, the letter was unlawful.¹⁴ The Board subsequently adopted the ALJ’s conclusion on this point.¹⁵ Thus, as seen in *Brandon Regional Medical Center*, the Board continues to find that a statement alerting a neutral employer about prospective picketing, even when phrased as a mere notice, must assure the neutral employer that any future picketing will be conducted in a manner to avoid ensnaring the neutral in the labor dispute between the primary employer and the union.¹⁶

In the instant case, the ALJ found that Respondent’s letter to the neutral customers constituted an unlawful threat to picket under existing Board law. Citing *Brandon*, the ALJ found Respondent’s threat to be “unqualified,” as it does not contain affirmative assurances

resolved by the fact that the Board has not relied on the “mere notice” rulings in the *Marshall & Haas* or *Cleveland Electro Metal* decisions since 1986.

¹² 346 NLRB 199 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007).

¹³ Id. at 202 (emphasis added)

¹⁴ Id.

¹⁵ Id. at 200.

¹⁶ E.g., id.; *Iron Workers Local118 (Tutor-Saliba Corp.)*, 285 NLRB 162, 164-65 (1987) (finding violation where union stated that it would picket primary at neutral jobsite); *Food & Commercial Workers Local 506 (Coors Distributing)*, 268 NLRB 475, 477-78 (1983) (finding violation where union informed neutral that although “we do not wish to disrupt the [neutral site], as long as the [primary product] is being sold we will support the efforts of the Boycott Committee.”), enf. 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision).

that any picketing would conform to *Moore Dry Dock* or otherwise be conducted in a lawful manner. Because Respondent's notice here constitutes a threat, and that threat is unqualified, the ALJ found that Respondent's conduct violated Section 8(b)(4)(ii)(B) under existing Board law.

C. Circuit Court Treatment of Threats to Picket

The Board's jurisprudence regarding threats to picket, however, has been met with judicial resistance from both the Ninth and D.C. Circuits. The Ninth Circuit was the initial circuit to reject the Board's jurisprudence. In *NLRB v. Ironworkers Local 433*, 850 F.2d 551 (9th Cir. 1988), the court refused to enforce a Board decision finding a violation of Section 8(b)(4) where a union representative failed to qualify his statement to a neutral contractor that "I'll picket the job and see that [the primary] doesn't put up a piece of steel."¹⁷ The court criticized the Board's almost singular focus on whether the union referenced *Moore Dry Dock* in its communications to the employer, finding it "troublesome given the informal, non-legalized reality of day-to-day labor relations."¹⁸ The court determined that "[t]he primary question is not whether particular words were used ... but how, given the context of the conversation, the union's statements should be reasonably understood."¹⁹ In considering the context of the conversation, the court noted that the statement at issue was "specific and limited," and merely reflected an intention to picket the steel work being done by the primary employer given the respective knowledge of the union and neutral employer representative.²⁰ Furthermore, the court pointed out that the union could conduct the threatened common situs picketing lawfully, noting "that there is still considerable merit to the general legal principle

¹⁷ Id. at 553.

¹⁸ Id. at 556.

¹⁹ Id. at 557.

²⁰ Id. at 556.

that people should be presumed to be acting lawfully until proven otherwise.”²¹ Finding no independent evidence of unlawful secondary intent, the court thus refused to enforce the Board’s order: “We see no justification for requiring [a *Moore Dry Dock* qualification] in the absence of evidence that the union intends to picket in an unlawful manner or that its conduct or statements would reasonably be so understood.”²²

The Ninth Circuit reaffirmed and strengthened its holding two years later in *Plumbers Local 32 v. NLRB*.²³ In its underlying decision in that case, the Board tried to distinguish *Ironworkers* by pointing out that the threat to picket in the current case before the Ninth Circuit was directed at the entire “jobsite” and not just the work of the primary employer.²⁴ The Ninth Circuit was “not persuaded” and rejected the Board’s decision, reasoning that “[a]lthough the picketing could turn out to be conducted in an unlawful manner,” such a finding was not justified from a bare, unqualified threat to picket a jobsite unless the “totality of the circumstances” indicated an “impermissible secondary intent” directed towards the neutral employer.²⁵ The court found that the evidence did not support a finding of impermissible intent, and thus reversed the Board’s decision.

More recently, in *Sheet Metal Workers, Local 15 v. NLRB*,²⁶ the enforcement proceeding that arose from the Board’s decision in *Brandon Regional Medical Center*, the D.C. Circuit endorsed the Ninth Circuit’s reasoning. The D.C. Circuit refused to enforce the Board’s order in *Brandon*, based primarily on the fact that the union’s letter to the neutral did not contain any evidence that the union intended, or “threatened,” to engage in unlawful

²¹ Id. at 557.

²² Id.

²³ 912 F.2d 1108 (9th Cir. 1990).

²⁴ *Plumbers Local 32 (Ramada, Inc.)*, 294 NLRB 501, 501 n.1 (1989), rev’d 912 F.2d 1108 (9th Cir. 1990).

²⁵ *Plumbers Local 32*, 912 F.2d at 1110-11.

²⁶ 491 F.3d 429 (D.C. Cir. 2007).

picketing.²⁷ The D.C. Circuit adopted the Ninth Circuit’s reasoning that the Board “could not presume that a union’s threat to picket the job was a threat to picket contrary to the law, when picketing at the job could be done in a lawful manner.”²⁸ Because “protection of lawful conduct ‘would be undermined if a threat to engage in protected conduct were not itself protected,’” the court declined to enforce the Board’s order.²⁹

The Board recently noted the Ninth and D.C. Circuits’ rejection of the “unqualified threat” doctrine. *Local 560, Int’l Bhd. of Teamsters*, 360 NLRB No. 125 slip op. at 6 n. 11 (May 30, 2014). In that case, however, it had “no need to address those decisions or the doctrine’s continuing vitality,” as the union included the required *Moore Dry Dock* assurances in its letters to neutral employers. *Id.*

Under the approach adopted by these circuits, Respondent’s notice to the neutrals in the present case would unquestionably be lawful. Respondent’s failure to qualify its notice of prospective picketing would not be problematic, as there is no extrinsic evidence that the Union evinced any unlawful intent to pressure the neutrals. Significantly, if the Board were to find that Respondent’s notice here was an unlawful threat to picket, the decision would be tested in either the Ninth or D.C. Circuits, and it is almost certain that the court would deny enforcement of the Board’s order.

²⁷ *Id.* at 435-36.

²⁸ *Id.* (quoting *Plumbers Local 32*, 912 F.2d at 1110).

²⁹ *Id.* at 434 (quoting *NLRB v. Servette, Inc.*, 377 U.S. 46, 57 (1964)). The Third Circuit is the only other circuit to recently consider the Board’s position on these unqualified threats. In *NLRB v. IBEW, Local 98*, 251 F. App’x 101 (3rd Cir. 2007), the Third Circuit found substantial evidence to enforce a Board decision finding various violations of Sections 8(b)(1)(A) and 8(b)(4)(i) and (ii)(B). In doing so, however, the Third Circuit did not specifically address the question of why the unqualified threat in that case violated the Act. The court, in fact, did not even acknowledge the contrary decisions in the Ninth and D.C. Circuits. General Counsel notes, however, that the union’s violations in the Third Circuit case included blocking ingress and egress, threats of physical violence, and actual picketing with an unlawful secondary object. *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740 (2004).

D. Reasons for Adopting the Approach of the D.C. and Ninth Circuits

General Counsel respectfully suggests that the approach of the Ninth and D.C. Circuits is sound, at least in the context of Respondent's letter. General Counsel respectfully urges that the Board find that Respondent's notice to the neutral employer about prospective picketing of the primary employer at the neutral's facility is not unlawful, even though it was not qualified by *Moore Dry Dock* language. "The general legal principle that people should be presumed to be acting lawfully until proven otherwise," recognized by the Ninth Circuit, is reasonable and reflected in the burden of proof that the General Counsel has to carry in every unfair labor practice proceeding. And, as recognized by both circuits, the future conduct noticed in this letter is not *per se* unlawful; a union can lawfully picket at a common situs so long as the picketing is directed at the primary and there is no evidence of an improper motive.³⁰ In agreement with the Ninth and D.C. Circuits, General Counsel urges that an ambiguous statement alone should not be enough to carry the General Counsel's evidentiary burden. Although there may be cases where the wording of a statement or extrinsic evidence of an unlawful object causes mere notice to rise to the level of a threat of unlawful secondary conduct, this case presents a clear example of what should constitute lawful notice to neutral employers.

Further, General Counsel respectfully suggests that the Board's focus on requiring unions to provide specific assurances that any future common situs picketing will be conducted in a lawful manner is logically misguided. The practical effect of such an assurance is minimal at best. The focus of Section 8(b)(4)(ii)(B) is to limit the effects of primary labor disputes on secondary employers. That a private letter or conversation

³⁰ See *Sheet Metal Workers, Local 15*, 491 F.3d at 435-36; *Plumbers Local 32*, 912 F.2d at 1110-11.

between a union and a neutral employer references *Moore Dry Dock* has virtually no influence on how third parties will react to any future picketing that may take place, and thus little actual impact on the effects of the picketing on the secondary employer. And, as a corollary, the effect of any written or spoken assurance has little, if any, effect on the union's subsequent conduct and the effects of that conduct; there is nothing to stop the union from saying that it is going to comply with *Moore Dry Dock* and then acting to the contrary. The requirement that unions provide a specific lawful disclaimer in virtually every communication to a neutral employer regarding common-situs picketing thus functions as a legal trap for the unwary that provides little, if any, actual utility to the neutral.

Moreover, the Board's near-singular focus on a *Moore Dry Dock* assurance as the bright line that divides lawful threats from unlawful threats does not withstand the logical scrutiny of the Ninth and D.C. Circuits. As the Ninth Circuit pointed out in *Ironworkers*, the *Moore Dry Dock* standard itself is merely an evidentiary presumption, not an inflexible rule of law.³¹ Bare compliance with the *Moore Dry Dock* criteria does not ensure that a union will be found to have engaged in lawful picketing;³² additionally, failure to abide by the standard does not automatically lead to liability.³³ Thus, a statement by a union that it intends to comply with *Moore Dry Dock* standards, even if given in good faith, is not such a reliable predictor of lawful, future conduct that the mere failure to give such assurance should

³¹ 850 F.2d at 554; see also *IBEW, Local 861 (Plauche Electric, Inc.)*, 135 NLRB 250, 255 (1962) (“[*Moore Dry Dock*] standards are not to be applied on an indiscriminate *per se* basis, but are to be regarded merely as aids in determining the underlying question of statutory violation.”) (emphasis in original).

³² E.g., *IBEW Local 369 (Garst-Receveur Construction Co.)*, 229 NLRB 68, 68-69, 68 n.1 (finding violation of 8(b)(4) due to evidence of unlawful secondary object despite fact that “the picketing at first glance appeared to meet the formal requirements of [*Moore Dry Dock*]”); see also *id.* at 69 (Chairman Fanning, dissenting) (“[The majority opinion] reaches that conclusion although the Union, without question, carefully complied with the rules set down in *Moore Dry Dock* for lawful primary picketing in this situation.”).

³³ *IBEW, Local 302 (ICR Electric)*, 272 NLRB 920, 920 n.2 (1984) (no violation where “factors indicating a primary objective outweigh the technical breach of one of the *Moore Dry Dock* criteria.”); *United Brotherhood of Carpenters, Local 1245 (New Mexico Properties, Inc.)*, 299 NLRB 236, 242 (1977) (Board affirmed ALJ finding that union did not violate Section 8(b)(4) despite its limited failure to respect reserved gate system).

presumptively be deemed to indicate the union is going to engage in misconduct. General Counsel respectfully suggests that it is unreasonable to hinge a violation of the Act on such a tenuous, speculative, and per se application of *Moore Dry Dock*.

We note that neither the Act itself, nor any Board or court precedent, require a union to provide any notice to neutral employers of its intent to picket a primary employer at a common situs. Thus, a union may commence picket activity at a common situs without fear of violating Section 8(b)(4)(ii)(B) of the Act, so long as it strictly adheres to the strictures of *Moore Dry Dock* and engages in no other unlawful conduct. See *Electrical Workers IBEW Local 970 (Interox America)*, 306 NLRB 54, 55 (1992). On the other hand, under current Board law, should a union provide notice of activities that might potentially disrupt the neutral employer's operations, affording the neutral with sufficient time in order to isolate itself from the impact of the picketing, the union may be confronted with Board unfair labor practice charges, subjected to Section 10(l) injunction proceedings to halt the otherwise lawful picketing, and found to have committed a violation of the Act, if it fails to include assurances that it will comply with *Moore Dry Dock* standards (assurances that would not have been required if the union had simply ambushed the neutral with its picketing). The union would "have broken the law...by failing to promise it would not break the law." *Sheet Metal Workers, Local 15*, 491 F.3d at 434.

This incongruous result shows the disadvantages of requiring *Moore Dry Dock* assurances in communications to neutrals that do not otherwise constitute threats of unlawful conduct, and of the rational basis for not requiring such assurances. As pointed out by the Ninth Circuit, "there is still considerable merit to the general legal principle that people should be presumed to be acting lawfully until proven otherwise." *NLRB v. Ironworkers*

Local 433, 850 F.2d at 557. Indeed, the lack of wisdom of this “unqualified threat” presumption is shown by the higher burden of proof imposed on the General Counsel in every other unfair labor practice proceeding. The law, in its current posture, represents an ill-considered reduction of the General Counsel’s burden of proof when it permits the General Counsel to use a union’s unqualified statement of intent to engage in lawful primary picketing as presumptive proof of a threat to engage in unlawful secondary activity, merely because the union fails to also provide *Moore Dry Dock* assurances.

IV. CONCLUSION

For the reasons set forth above, although Respondent admitted to facts constituting a violation of the law, General Counsel respectfully urges that the proper course for the Board to follow is set forth in the reasoning of the Courts of Appeals for Ninth and D.C. Circuit. The Board should overrule the line of cases requiring unions to give *Moore Dry Dock* assurances when giving otherwise lawful notice of an intention to picket, and should find, contrary to the recommendations of the ALJ, that Respondent did not violate Section 8(b)(4) of the Act.

Dated at Las Vegas, Nevada this 25th day of August 2014.

Respectfully submitted,

/s/ Nathan A. Higley

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CERTIFICATE OF SERVICE

I hereby certify that GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS in INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357, AFL-CIO, Case 28-CC-115255 was served via E-Gov, E-Filing, and electronic mail, on this 25th day of August 2014, on the following:

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