

Appeal Nos. 19-70322  
19-70575

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION 357,  
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent*

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Petition for Review from Decision by  
the National Labor Relations Board in Case No. 28-CC-115255

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**REPLY BRIEF**

**of**

**PETITIONER**

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## SUMMARY OF ARGUMENT

Intervenor's<sup>1</sup> argument says more by what it doesn't address than what it does. Intervenor's brief fails to mention the two controlling cases from this Court on the precise legal issue in this case. The ultimate decision and the facts of this case are completely controlled by this Court's previous decisions in *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32*. Yet, Intervenor's brief does not address, mention or even cite these controlling cases.<sup>2</sup>

Intervenor's apparent error in failing to even mention the controlling cases is further called into question by Intervenor's first statement of issue, which was "Whether the Union's request for a strike sanction copied only to the neutral was a threat that violated 8(b)(4)." The answer to this statement of issue has already been answered directly by this Court in *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32*. Moreover, this same question was answered in the same manner by the D.C. Circuit in *Sheet Metal Workers Local 15 v. NLRB*.

In its decision, the NLRB held a labor union automatically violates the National Labor Relations Act ("NLRA") if it does not

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<sup>1</sup> Intervenor refers to Desert Sun Enterprises d/b/a Convention Technical Services.

<sup>2</sup> Intervenor's Brief is addressed here because the National Labor Relations Board, as Respondent, has inexplicably decided not to file a Response Brief.

preemptively state any picketing it will engage in will be conducted lawfully. This would be true even if actual picketing is later conducted and that picketing is conducted lawfully. The NLRB's stated rule has twice before been rejected by this Court. *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32* have not been overturned or abrogated and control in this case.

Instead of addressing the controlling precedent from this Court, Intervenor meanders aimlessly through a review of the legislative history of the Taft-Hartley Act, examines the First Amendment, and addresses precedent from the NLRB that is contrary to the precedent of this Court and does not control in this case. Either Intervenor was mistaken as to the venue of this case or it knows it simply has no argument against the application of *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32*.

Intervenor's brief further fails to address the actual question at issue here, which is whether the NLRB's decision is supported by the language of the Act. It is not. Intervenor's statement of facts and Supplemental Excerpts of Record should be ignored by this Court because the facts stated were not part of either the administrative law judge's decision or the NLRB's decision. In fact, the information Intervenor cites extensively is evidence the administrative law judge refused to consider and the NLRB, in agreement with the ALJ, chose not to consider. Intervenor cannot use this information to support the

NLRB's decision when the NLRB specifically chose to reject consideration of the information.

## ARGUMENT

### **I. THE HISTORY OF THE TAFT-HARTLEY ACT HAS NO EFFECT ON WHETHER OR NOT THE NLRB'S DECISION AND STATED RULE CAN BE UPHELD.**

The Taft-Hartley Act amended the National Labor Relations Act by adding Section 8(b)(4). That Section provides “[i]t shall be an unfair labor practice for a labor organization or its agents...to *threaten, coerce, or restrain* any person engaged in commerce or in an industry affecting commerce.” 29 U.S.C. § 158(b)(4)(ii) (emphasis added).

The Intervenor's brief and the NLRB's decision refused to examine the specific language of Section 8(b)(4). Intervenor cited block quotes from legislative history of the statute in lieu of addressing the text of the statute itself. “Judicial investigation of legislative history has a tendency to become...an exercise in ‘looking over a crowd and picking out your friends.’” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 US 546, 568 (2005) (citing Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983)). This is why the plain words of a statute are the best evidence of congressional intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The question before this Court is whether Local 357 threatened, coerced or restrained a neutral or secondary employer (the LVCVA)

simply by providing that employer with notice of the union’s intention to picket the primary employer (the Intervenor). Plainly and simply, the statute prohibits unions from threatening, coercing or restraining the neutral or secondary employer. The legislative history cited by Intervenor doesn’t change what Intervenor and the NLRB must prove. Local 357 did not violate the text of Section 8(b)(4).

What Intervenor attempts to do is precisely what Justice Kennedy warned against in *Allapattah Services*, which is “looking over a crowd and picking out your friends.” Intervenor’s failure is the same as that of the NLRB in its decision, which is refusal to examine or accept the specific words of the statute.

The absurdity of Intervenor’s argument concerning the legislative history of the Taft-Hartley Act is further revealed by the argument’s illogical conclusion. *See* Dkt. 40, at 6. It is there that Intervenor concludes its legislative history argument by stating “[i]t was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B,” which is an accurate statement of the statute, but then Intervenor goes on to state—with no support in the record or in reality—“[t]his is what the Union threatened to do when it sent the request for a strike sanction to LVCVA board members.” *Id.* That conclusion is simply nonsensical and not at all what the NLRB’s decision stated.

The NLRB's decision held simply that Local 357 violated Section 8(b)(4) because its sanction request copied to the LVCVA did not prophylactically state its picketing would be conducted lawfully. The Board's decision is not supported in any way by the specific language of Section 8(b)(4). For these reasons, the legislative history of the Taft-Hartley Act has no bearing or effect whatsoever. Local 357's notice to a neutral employer of its intent to picket a primary employer does not violate the plain language of Section 8(b)(4)(ii)(B). The Board's decision should be denied enforcement because Local 357 did not violate the statute.

**II. INTERVENOR'S FIRST AMENDMENT ARGUMENT DOES NOT DICTATE THE OUTCOME OF THIS CASE AND THE ARGUMENT ITSELF PRESUMES A SECONDARY BOYCOTT IS PRESENT.**

"Congress shall make no law...abridging the freedom of speech."  
U.S. Const., Amend. I. The First Amendment's edict does not apply with any less strength simply because the speaker is a labor union. *See Thornhill v. Alabama*, 310 U.S. 88 (1940).

Section 8(b)(4) prohibits a labor union from threatening, coercing or restraining secondary or neutral employers. As the Supreme Court recognized three decades ago, the statute's words "are 'nonspecific, indeed vague,' and should be interpreted with 'caution' and not given a 'broad sweep.'" *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 US 568, 578 (1988) (quoting *NLRB v.*

*Drivers*, 362 U. S. 274, 290 (1960)). To broadly construe the statute would raise serious First Amendment concerns. *See id.*

The NLRB's decision reads Section 8(b)(4) in the broadest possible sense, which creates a First Amendment issue. The Board's decision requires Local 357 and other unions to affirmatively state their actions will be undertaken lawfully. The NLRB's decision requires, in effect, forced or compelled speech. The Board is saying in order for a labor union to not violate the law, it must first say so. The Board cannot compel union speech in such a fashion. It also cannot limit labor union speech through a broad application of Section 8(b)(4), which the Supreme Court has already stated must be narrowly construed, specifically to avoid First Amendment concerns.

Intervenor argues the First Amendment is no concern when a union engages in a secondary boycott. To the extent a secondary boycott actually occurs in a hypothetical case, Local 357 cannot dispute that is an accurate statement of law. However, a secondary boycott this was not. This case merely involved notice provided to a secondary employer of a potential picket of the primary employer (Intervenor). That is not a secondary boycott and to hold otherwise would be to take away Local 357's right to inform others of legitimate job actions against primary employers. That would expand Section 8(b)(4) far beyond its text and blow a hole directly through the First Amendment. The NLRB's

decision is unenforceable under this analysis and must be refused enforcement by this Court.

**III. IRONWORKERS, LOCAL 433 AND PLUMBERS & PIPEFITTERS, LOCAL 32—NOT BOARD PRECEDENT—CONTROL THE OUTCOME OF THIS CASE.**

“An unqualified threat to picket a jobsite alone does not constitute a violation of the Act’s secondary boycott provisions.” *Plumbers & Pipefitters, Local 32 v. NLRB*, 912 F.2d 1108, 1111 (9th Cir. 1990) (citing *Ironworkers, Local 433 v. NLRB*, 850 F.2d 551, 557 (9th Cir. 1988)). These two cases from this Court have stood for thirty years and have not been set aside or abrogated in any manner. They still control the exact issue at stake in this case, which is whether notice to a secondary employer of intent to picket a primary employer is lawful.

The Intervenor did not cite to these cases whatsoever. The Intervenor had the opportunity to argue this case was distinguishable and that *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32* did not apply. Intervenor chose not to. The Intervenor could have argued for a change in law in this matter, but it chose not to. Instead of arguing against this precedent or addressing it even briefly, the Intervenor chose to ignore the controlling precedent entirely, so much so that the controlling precedent received nary a mention by Intervenor.

Intervenor’s citation to Board case law and its argument that under Board precedent Local 357 violated the Act has no bearing before

this Court. The Ninth Circuit rejected this Board case law over thirty years ago.

The facts in this case show only that Local 357 provided notice to the LVCVA of a request for a strike sanction for a picket of a primary employer. EOR0010-11. Local 357's actions are lawful under *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32*. Local 357's letter did not even mention—let alone threaten—a picket of any secondary person, employer or entity. *See id.* Local 357's actions in this case are no different from the actions of Local 433 or Local 32, and even if they were different, the NLRB and Intervenor have not argued how they are different or why a different result must follow. Like Local 433 and Local 32, Local 357 in this case simply provided notice of a potential picket of the primary employer (Intervenor) to a secondary entity (the LVCVA). As such the NLRB's decision in this case must be denied enforcement under *Ironworkers, Local 433* and *Plumbers & Pipefitters, Local 32*.

**IV. INTERVENOR'S BRIEF CITES TO FACTS NOT DECIDED BY THE ALJ AND NOT BEFORE THE NLRB AND THAT INFORMATION IS IRRELEVANT.**

The Supplemental Excerpts of Record filed by Intervenor largely consist of a single document, which is Local 357's Motion for Summary Judgment filed before the Administrative Law Judge hearing. *See*

*generally* SER001-69.<sup>3</sup> The Intervenor’s Statement of Facts in its brief cites almost exclusively to a transcript of a deposition taken in a separate district court case. *Id.* The evidence and facts the Intervenor attempts to interject into this appeal were not considered by the ALJ. EOR0011, at n. 1. The same evidence was also not considered by the NLRB in its decision, but not for Intervenor’s lack of trying to add in the extraneous, irrelevant information.

In its decision, the Board stated the Intervenor’s proposed additional evidence had “no bearing on the General Counsel’s complaint.” EOR0018, at n. 8. The Board went on to state “[w]e accordingly reject [Intervenor’s] exceptions and motion.” *Id.*

After having been denied introduction of this extraneous, irrelevant information by the ALJ and then the NLRB, the Intervenor attempts to sneak this information into this appeal by citing to it in its brief and placing the information into its Supplemental Excerpts of Record. Though this may certainly be a clever attempt, it is improper, and the evidence remains extraneous and irrelevant.

The sole question before this Court is whether to decline enforcement of the NLRB’s Order, which held Local 357 violated Section 8(b)(4) of the Act by sending notice of its potential picket of the Intervenor to a secondary entity. The only evidence necessary for that

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<sup>3</sup> Citations to SER are to the Intervenor’s Supplemental Excerpts of Record. Dkt. 41.

consideration is in the ALJ decision and the Board's decision. On the record before the ALJ and the NLRB, this Court's precedent dictates the NLRB's decision must be denied enforcement. Intervenor is not permitted to introduce extraneous information not considered by the Board. The NLRB's decision should be denied enforcement.

**V. INTERVENOR'S *MOORE DRY DOCK* ARGUMENT PROVIDES NO SUPPORT FOR THE NLRB'S DECISION.**

In *Moore Dry Dock*, the NLRB set out four standards that must be examined in cases where a secondary boycott is claimed at a common situs. Those standards are:

- (1) whether the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises;
- (2) whether the primary employer is engaged in its normal business at the situs;
- (3) whether the picketing takes place reasonably close to the situs; and
- (4) whether the picketing discloses that the dispute is with the primary employer.

*See Iron Workers Dist. Council v. NLRB*, 913 F.2d 1470, 1475 (9th Cir. 1990) (citing *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950)).

As is clear within the standards themselves, the *Moore Dry Dock* standards are aimed at determining whether picketing was lawful when picketing is conducted. Intervenor argues Local 357 violated *Moore Dry Dock* because its notice did not state the elements of the *Moore Dry Dock* standards. Preemptive or prophylactic statements that picketing will be conducted lawfully cannot be required to obtain a holding that no violation of Section 8(b)(4) occurred. *Ironworkers, Local 433*, 850 F.2d at 557.

Intervenor's argument seeks to stretch the Board's already indefensible position beyond what even the Board stated in its decision. The Board stated "[w]e do not expect unions to necessarily cite *Moore Dry Dock* or use any specific legalese." EOR0019. Intervenor ignores this portion of the Board's decision in favor of arguing for specific legalese and citation to *Moore Dry Dock*. The Intervenor's argument has no merit and goes even further than the meritless decision of the Board.

### CONCLUSION

The simple and unmistakable fact of this case is the NLRB has wasted judicial resources and the time of all parties involved by again attempting to enforce a rule that has thrice been rejected over three decades—on two occasions by this Court and on one occasion by the D.C. Circuit. It is difficult to determine what the NLRB's endgame was on this matter because the only two courts to which the case could be appealed had already refused enforcement of this exact rule.

Inexplicably, the Board simply chose not to file a brief in this matter. This Court's decisions in *Ironworkers, Local 433* and *Plumbers and Pipefitters, Local 32* control here and the NLRB's decision must be denied enforcement.

Dated: October 15, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE FOR BRIEFS**

**This brief contains 2,589 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

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Dated: October 15, 2019.

Respectfully submitted,

/s/ Nathan R. Ring

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 15, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ April D. Denni*  
An employee of The Urban Law Firm