

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: June 21, 2004

TO : Cornele A. Overstreet, Regional Director  
Region 28

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: United Brotherhood of Carpenters & Joiners,  
Local 1506  
(Sherman & Howard, LLC)  
Case 28-CC-964

560-2575-6746  
560-2575-6767-2500  
560-7540-2000  
560-7540-8060-6717

The Region submitted this case for advice as to whether the Union violated Section 8(b)(4)(ii)(B) when three of its agents displayed a large banner 300 feet from the front entrance to the neutral employer's facility, and a greater distance from a parking garage used by visitors to that facility. We conclude that the Region should dismiss the instant charge, absent withdrawal, because the banner was too far removed from the neutral employer's site either to constitute picketing or to coerce the neutral through fraudulent or misleading language.

### **FACTS**

Sherman & Howard, LLC (the Employer) is an Arizona limited liability corporation with offices and places of business in Phoenix, Arizona, as well as Colorado and Nevada. It is engaged in the business of providing legal services to clients.

In March 2004, the Employer's Phoenix office was located in an office building at 1221 E. Osborn Road, but it had signed a lease for office space at the Viad Tower, located less than two miles away. The general contractor performing renovation work at the Viad project was Steven Leinweber Construction of Arizona, Inc., which subcontracted the drywall and painting work to Diamondback Drywall and Painting, Inc. (Diamondback). Carpenters Local 1506 (the Union) had a primary labor dispute with Diamondback due to its alleged failure to pay its workers area standard wages and benefits.

By letter dated March 5, the Union informed the Employer of an ongoing labor dispute with Diamondback and asked the Employer to use its managerial discretion not to allow Diamondback to perform any work at its projects. In

addition, the letter states that the Union was engaging in an "aggressive public information campaign against Diamondback," including "highly visible banner displays and distribution of handbills."

Thereafter, commencing on or about March 16, the Union displayed a stationary banner on the public sidewalk approximately 300 feet from the Employer's front entrance, and approximately 75 feet from the entrance of the office building located next to the Employer's office building, at 1313 E. Osborn Road. The banner was held at ground level by three individuals, near the busy four-lane, two-way street, facing towards the street. A two-foot high wall is located immediately behind the sidewalk, and would have blocked the view of the banner from anyone standing between it and the two office buildings. The banner was 15 feet by 4 feet, and consisted of the words, "Shame on Sherman and Howard, LLC," in letters approximately 16 inches high, and the words, "Labor Dispute," in letters approximately 8 to 12 inches high at each corner. In addition, the individuals holding the banner gave handbills describing the Union's dispute with Diamondback to anyone requesting information.

Visitors to the Employer's office who arrive by automobile generally use driveways located to the east and west of the buildings located at 1313 and 1221 E. Osborn Road to reach the parking garage located in the rear, and enter the buildings through back entrances from which they would not be able to see the banner. Such visitors generally would not drive past the banner on their way to the garage. No parking spaces exist on E. Osborn Road in front of the buildings. Individuals walking to the Employer's office would not be able to walk in front of the banner because it was held within inches of the curb.

On May 1, the Employer relocated its office to the Viad Tower. No bannering activity has been reported since that date.

#### **ACTION**

We conclude that the Region should dismiss the charge, absent withdrawal. The Union's bannering was too far removed from the Employer's front entrance to generate the requisite confrontation with members of the public to find that its conduct amounted to picketing. Moreover, the misleading language on the banner did not coerce the neutral Employer within the meaning of Section 8(b)(4)(ii)(B) because there was not a sufficient nexus to the site of the dispute to have a coercive impact.

I. The Union's Conduct Did Not Amount to Picketing.

The Board does not require that a finding of picketing be predicated on the presence of indicia typically associated with picketing, such as union agents patrolling with placards attached to sticks.<sup>1</sup> Rather, the essential element is that there be some form of confrontation between union agents and third persons trying to enter the targeted facility.<sup>2</sup> In Chicago Typographical Union No. 16 (Alden Press, Inc.), the Board found that the union's conduct was publicity other than picketing because there was no confrontation with individuals trying to enter the neutral employer's premises.<sup>3</sup> Although the union's supporters patrolled with picket signs, they did so at shopping centers and public buildings far removed from the neutral employer's premises.<sup>4</sup>

In several cases, the General Counsel has alleged that banners similar to that involved here were tantamount to picketing.<sup>5</sup> In those cases, the General Counsel relied on factors such as the misleading language of the banner, the size of the banner, the presence of union agents, and the display of the banner at the premises of the neutral employer, to establish the requisite confrontation.<sup>6</sup> In contrast, we conclude that the Union's conduct here does not constitute picketing because it failed to create a confrontation with individuals approaching the Employer's

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<sup>1</sup> See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 72 (1991); Laborers Local 389 (Calcon Construction Co.), 287 NLRB 570, 573 (1987).

<sup>2</sup> See Atlanta Typographical Union No. 48 (Times-Journal, Inc.), 180 NLRB 1014, 1015 fn. 4 (1970); Chicago Typographical Union No. 16 (Alden Press, Inc.), 151 NLRB 1666, 1669 (1965) (quoting NLRB v. United Furniture Workers (Jamestown Sterling Corp.), 337 F.2d 936, 940 (2d Cir. 1964)).

<sup>3</sup> 151 NLRB at 1669.

<sup>4</sup> Id.

<sup>5</sup> [FOIA Exemption 5

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<sup>6</sup> Id.

office. Similar to Alden Press, the Union here did not create a confrontation with people trying to enter the neutral Employer's office. Thus, the Union was 300 feet away from the front entrance to the building containing the Employer's office. In addition, few, if any, visitors to the Employer's office would have seen the banner because they would not have driven past it on their way to the parking garage; would not have walked near it on their way from the parking garage to the building's rear entrance; and would not have seen it when walking on the sidewalk to the front entrance because of its placement at the curb, directly in front of a wall, and facing away from approaching pedestrians, towards a busy public road. As a result, there was no confrontation between the Union and third persons entering the Employer's building that would cause those individuals to turn away. Thus, the Union's conduct did not constitute picketing.<sup>7</sup>

II. The Language on the Union's Banner Did Not Coerce Neutral Employer UTI.

The provisions of Section 8(b)(4) reflect "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."<sup>8</sup> In cases involving struck-product consumer picketing, the Board routinely finds that a

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<sup>7</sup> See also Carpenters Local 1506 (Universal Technical Institute, Inc.), Case 28-CC-960, Advice Memorandum dated May 5, 2004 (finding union's display of banner was not picketing because it was 600 feet from driveway entrance and was separated from facility by a large building); Carpenters Local 1506 (Brinker Intl. Payroll Co.), Case 21-CC-3335, Advice Memorandum dated February 19, 2004 (finding union's display of banner was not picketing because, among other things, banner at one location was stationed 450 feet from facility's entrance and "patrons would not feel . . . confronted as they entered"; at other location, much closer to a neutral employer's pedestrian entrance, patrons "would not necessarily drive by the banner" because other vehicular entrances were available); Carpenters Local 1765 (Capform, Inc.), Cases 12-CC-1259, et al., Advice Memorandum dated June 26, 2003 (finding bannering at Whitley Bay location was not picketing because location and positioning of banner away from access road and towards public highway was "innocuous").

<sup>8</sup> NLRB v. Denver Bldg. & Constr. Trades Council (Gould & Preisner), 341 U.S. 675, 692 (1951).

union violates Section 8(b)(4)(ii)(B) when it displays picket signs in front of a neutral employer's facility that fail to clearly identify the struck product to boycott and the primary employer with whom the Union has its labor dispute.<sup>9</sup> The rationale is that by standing in front of the neutral employer's facility with signs that fail to accurately describe the labor dispute, the union improperly causes customers to not patronize the neutral at all rather than patronize the neutral but boycott the primary employer's product.<sup>10</sup> As a result, the unrelated neutral employer is coerced to cease doing business with the primary not because of lawful primary pressure that causes falling demand for the primary's product, but because of the unlawful separate labor dispute the union has created with it.<sup>11</sup>

Here, the message on the Union's banner was misleading because it failed to accurately describe the true nature of the Union's labor dispute with Diamondback. The banner announced the existence of a labor dispute and named neutral Employer Sherman & Howard, LLC while omitting the primary employer's name and the fact that the Union only had a "secondary" labor dispute with the Employer. Reasonable

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<sup>9</sup> See Meat & Allied Food Workers Local 248 (Milwaukee Independent Meat Packers Assn.), 230 NLRB 189, 189 fn. 3 (1977), enfd. mem. 571 F.2d 587 (7th Cir. 1978); San Francisco Typographical Union No. 21 (California Newspapers, Inc.), 188 NLRB 673, 680 (1971), enfd. 465 F.2d 53 (9th Cir. 1972); Los Angeles Typographical Union No. 174 (White Front Stores, Inc.), 181 NLRB 384, 388 (1970); Times-Journal, Inc., 180 NLRB at 1016; Laundry Workers Local 259 (California Laundry & Linen Supply), 164 NLRB 426, 428 (1967).

<sup>10</sup> See White Front Stores, Inc., 181 NLRB at 388; Times-Journal, Inc., 180 NLRB at 1016. See also NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits), 377 U.S. 58, 63-64 (1964); Hoffman v. Cement Mason Local 337, 468 F.2d 1187, 1192 (9th Cir. 1972) ("[t]here is a great difference in impact when the public is asked to be selective among products once inside the secondary's premises . . . and in asking them to completely refuse to enter, or to cease all dealing with the secondary"), enforcing 190 NLRB 261 (1971) and 192 NLRB 377 (1971).

<sup>11</sup> See California Newspapers, Inc., 188 NLRB at 680; White Front Stores, Inc., 181 NLRB at 388; California Laundry & Linen Supply, 164 NLRB at 428. See also NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits), 377 U.S. at 71-72.

persons would have been misled into believing that the Union had a primary labor dispute with the Employer regarding its own employees even though no such dispute existed.<sup>12</sup>

Nevertheless, the misleading message on the Union's banner did not coerce the Employer within the meaning of Section 8(b)(4)(ii)(B) because, in stationing its banner far from the entrances to the Employer's building, the Union would not cause third persons to keep away from the Employer's law office. The circumstances here contrast with the typical scenario where a union's misleading sign is displayed directly in front of the neutral facility.<sup>13</sup> In those cases, the public could easily associate the misleading message on the sign with the nearby neutral employer. The message would therefore coerce the neutral employer because of its reasonable fear of lost business resulting from the impact of the message on its customers. Conversely, there is no independent evidence here showing that the public would infer that the Union has a primary labor dispute with the Employer. Thus, the banner was at least 300 feet away from the front entrance and visually separated by the office building itself from the rear entrance that is used by visitors arriving by automobile. Moreover, the message was facing out, away from the sidewalk, on a busy, four-lane street. In these circumstances, it is unlikely that the banner's message would cause third persons to turn away from the Employer.<sup>14</sup> As a result, the Union's message, albeit misleading, was not coercive conduct requiring the Employer to take steps to dismiss the primary employer, Diamondback, and, therefore, it did not violate Section 8(b)(4)(ii)(B).<sup>15</sup>

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<sup>12</sup> Any clarifying information in the Union's handbills is irrelevant because the Union stationed its banner near a busy, four-lane street where motorists could not obtain handbills.

<sup>13</sup> Cf. Milwaukee Independent Meat Packers, 230 NLRB 195, 199; California Newspapers, Inc., 188 NLRB at 674, 675; White Front Stores, Inc., 181 NLRB at 386; Times-Journal, Inc., 180 NLRB at 1014-15; California Laundry & Linen Supply, 164 NLRB at 431.

<sup>14</sup> See Universal Technical Institute, supra.

<sup>15</sup> Similarly, this case presents a different factual scenario than when a union distributes a handbill in front of a neutral employer's facility that misleads the public about which company is responsible for the primary labor dispute. See Hospital & Service Employees Local 399 (Delta Air Lines, Inc.), 263 NLRB 996, 997, 998-999 (1982),

Based on the preceding analysis, we conclude that the Region should dismiss the charge, absent withdrawal.

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remanded 743 F.2d 1417, 1428-29 (9th Cir. 1984), reversed 293 NLRB 602, 603 (1989). In Delta Air Lines, there was a sufficient nexus between the misleading message the union disseminated in its handbills and nearby neutral employer Delta so that approaching customers were likely to completely boycott Delta. Again, there is no such nexus in the present case that could result in third persons keeping away from the Employer's office.