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

# Advice Memorandum

DATE: October 31, 2002

TO : Alan B. Reichard, Regional Director
Veronica I. Clements, Regional Attorney
Bruce I. Friend, Assistant to the Regional Director
Region 32

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

SUBJECT: Northern California Regional Council of Carpenters,
Locals 405, 2236, 713, 125, 46 & 25
Cases 32-CC-1469-1; 32-CC-1480-1;
32-CC-1482-1; 32-CC-1483-1; 32-CB-5451-1

560-2550-8333
560-2575-6746
560-5067-2050
560-7540-2080-3700
560-7540-4000
536-2507
536-2509
536-2527

The issue presented for advice in these cases is whether the Union's overall conduct at neutral employers' premises, including handbilling while engaging in other conduct, violated Section 8(b)(4)(ii)(B); and whether other Union conduct violated Section 8(b)(1)(A).

## I. General Background

Since April 2001,[1] Lusardi Construction Company (Lusardi) and Northern California Regional Council Of Carpenters and Locals 405, 2236, 713 and 152 (collectively the Union) have been engaged in a labor dispute. The Union has publicized the dispute at various locations in California, including Lusardi jobsites and the offices of employers doing business with Lusardi. The dispute has given rise to a variety of charges. There was Union activity alleged to violate Section 8(b)(4)(i)(ii)(B), which included handbilling and/or leafleting, marching in a circle, using bullhorns, floating rat balloons and/or wearing rat costumes, and displaying large signs. Also there was activity alleged to violate Section 8(b)(1)(A), which included threatening an employee with lawsuits, blocking neutral and primary gates, and unlawfully entering jobsites.

The principal neutral employers involved in these cases are Legacy Partners (Legacy), a real estate company, which

[1] All dates are in 2001 unless otherwise noted.

is involved in the business of property management and real estate development with its headquarters located in Foster City, California; Venture Corporation (Venture), a land development and building company with its main office located in Mill Valley, California; and WP Investments (WP), which is engaged in real estate development, property management, and, on a limited basis, commercial brokerage, with its main office located in Woodside, California. Each of these neutral employers used Lusardi to supply labor at construction worksites.

## II. Facts for Specific 8(b)(4) Incidents

### A. Legacy office

The Union demonstrated at Legacy's office over several months. Legacy's office is in one of two identical office buildings, which have a 40-foot wide plaza between them. The plaza also separates the buildings from the parking lot.

During the months of July and August, two or three Union agents leafleted at the entrance of the office building in which Legacy is located. The leaflet stated businesses should not work with Legacy because Legacy affiliated with Lusardi. Also present was a truck towing an approximately six-foot by six-foot sign. The truck was either parked in or circling the parking lot in front of the building, approximately 40 feet from the entrance. The sign towed by the truck said Lusardi was unfair, and was taking jobs from the community. This conduct started daily at 8:00 a.m., shortly before Legacy's employees were due to report to work, and ended around noon.

From September to October, the Union continued the same conduct. It also began floating a giant rat balloon or having a Union agent present wearing a rat costume. The Union agents also yelled to ask Legacy why it was doing business with Lusardi, that Lusardi was a rat contractor, that Lusardi should not be trusted, and asked whether people cared about the community.

During the first half of October, on some days between the hours of 8:00 a.m. and 10:00 a.m., the Union had one Union agent leafleting at the entrance to Legacy's parking lot while four other Union agents leafleted the plaza in front of the building. The four Union agents in the plaza moved about but did not march in any preset pattern or in a circle. Another Union agent held a six-foot by four-foot rat balloon, allowing it to float 10 feet from the ground. The truck with the sign drove up and down the parking lot. Language on the sign was the same as before, that Lusardi was unfair, and was taking jobs from the community.

On other days during that same October period, four to six Union agents leafleted in the plaza during the morning hours while yelling that Lusardi destroyed families. Also present was a truck with a sign in the back telling people to contact Legacy and ask why it employed companies like Lusardi. On at least one occasion four to six Union agents walked in a circle six feet in diameter about nine feet from the entrance. Another Union agent was six feet away from the group using a bullhorn, while another Union agent stood by the door leafleting. During this time, a truck was in the parking lot with a rat balloon attached to it.

During the latter half of the month of October, the Union demonstrated at Legacy's office from 8:30 until noon several times a week. One Union agent leafleted at the door entering the building while about 15 Union agents walked in a circle 20 feet from the entrance. Using more than one bullhorn, they sang a song and also yelled "Legacy, why are you hiding behind Inktomi [who is the building owner]; Lusardi is a rat, Legacy why do you use Lusardi; Why don't some one from Legacy come down and talk with us." Another Union agent used a bullhorn to tell people to "Ask Legacy why they're doing business with a rat contractor like Lusardi. Call Legacy Partners to do something about it or we'll be here every day. Ask Legacy Partners about justice, dignity, and workers' rights. Legacy Partners is using a rat contractor. Ask Legacy Partners why they're outsourcing their work." Some Union agents used noisemakers that sounded like a police siren. They also floated a rat balloon, which was visible from the sixth floor of the building where Legacy's main office is located. There was also a truck parked in the parking lot with a sign that said "Lusardi Construction is a rat contractor - Community beware." On at least one occasion, around October 25, 15 Union agents walked in a circle in front of the plaza and obstructed the walkway.

During the month of November, on consecutive days, 15 Union agents demonstrated from 8:00 a.m. until 10:00 a.m. by walking in an oblong circle some 20 to 30 feet from the entrance. The Union agents yelled that Legacy was hiring non-union companies. On one of those days when a Legacy employee refused to take a leaflet, a Union agent with a bullhorn walked about ten paces behind the employee yelling that she worked for Legacy. They also floated a rat balloon on those days. On another day in November 20 demonstrators walked in a circle in the plaza in front of Legacy's office building. They eventually ended up walking about in a

scattered fashion using several bullhorns making siren sounds.[2]

During December and January 2002, the Union continued its demonstrations by using a truck with a sign, leafleting, and floating a rat balloon.

B. Venture Office

The Union demonstrated at Venture's offices housed in a one-story building on a public street, which has a separate tenant in the rear of the building. Behind the building is a circular driveway. Venture's main entrance is on the side of the building, approximately eight to ten feet from the street. The area is largely residential; however, the building is located across the street from a supermarket and a block from a local high school.

On September 19, the Union began demonstrations at the Venture office. Mid-day, two or three Union agents appeared with a six-foot by six-foot sign, towed by a truck, with Lusardi's logo. The language on the sign said something about Lusardi being a rat contractor. The truck drove slowly around the block. During this same time several Union agents walked up and down the street in front of the building. One was dressed in a rat costume and another used a megaphone shouting that Venture does business with a rat contractor and for people to call Venture (stated Venture's phone number). Another leafleted while walking up and down the street. The company's president also approached the Union agents and discussed with them the text of a handbill that addressed discrimination against women.

On September 26, at 9:00 a.m., two Union agents leafleted at the Venture office. There was also an inflated 20-foot rat balloon held in front of Venture's office. During this time the president of the company and Lipscomb, a Union agent, spoke briefly.

The Union continued demonstrations without handbilling or leafleting on October 3, 19, 23, 29, and 31. A bullhorn was used to communicate that Lusardi was a rat, that Lusardi discriminated against women, and that Lusardi caused Bay Area people to lose their jobs. The Union agents urged

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[2] Regarding the noise level during October and November, witnesses from Legacy stated that on some days the noise level was high enough that they heard the noise inside their offices on the sixth floor. Therefore, they had to either cancel meetings with clients, employees, and others, or change the venue for the meetings.

people to call Venture and ask why Venture was doing business with Lusardi. During this time, a Union agent parked a truck with a sign in front of Venture's office building and honked the horn continuously.[3] The language on the sign made a statement about Lusardi being a rat contractor.

On November 1 and 2, four Union agents, one in a rat costume, leafleted at Venture's office. Another Union agent held a large inflated rat balloon in front of the office while a truck with a sign on the back circled the block. The Union agents used a bullhorn to communicate their message regarding Venture's business relationship with Lusardi.

On December 20, representatives from the Union and Venture met. The Union representative stated that it wanted Venture to stop using Lusardi because Lusardi was a non-union employer. The Union representative further stated that "if [Venture] wasn't doing business with Lusardi, [Venture] wouldn't be having this conversation," and "quite frankly, [Venture was] just collateral damage." The Union representative then questioned the Venture representative about whether Venture would consider hiring union contractors at its Morgan Hill Ranch project. The Venture representative said that of course Venture would consider hiring union contractors, and that Venture had already hired two union contractors. The Union representative again asked the Venture representative not to hire Lusardi. The Union representative said that "if Venture did not hire Lusardi again it wouldn't have the harassment in front of the building, but if [Venture] continued to work with Lusardi, [the Union] would continue to use whatever means possible to keep Lusardi out of Northern California."

On May 8, 2002, four to five Union agents leafleted in the parking lot and at the area around the outdoor stairs. Some of the Union agents wore "Grim Reaper" costumes. Two of the Union agents displayed an eight-foot long plastic sign regarding asbestos poisoning at Venture's job sites. The Union agents also yelled statements regarding Lusardi and asked the public to inquire why Venture was doing business with Lusardi. The Union made the statement that "if you want to get rid of us you have to dump Lusardi."

C. <u>WP Office</u>

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[3] Venture employees reported that the noise level was high enough to interfere with telephone conversations.

WP's building is a one-story structure. It is thirty feet apart from another building that houses four tenants. Immediately in front of both buildings is a parking lot, bordering a sidewalk. There is only one entrance/exit to the parking lot.

Twice between September 21 and 28, and on October 16, from 9:00 a.m. to noon, three to four Union agents demonstrated in front of WP. One or two stood at the entrance of the parking lot leafleting and using a bullhorn, yelling "Lusardi is a rat contractor; Lusardi is bad for the community; you’re losing jobs and a chance for employment because of Lusardi."[4] This conduct lasted about 30 minutes each time. Another Union agent held a 12-foot by 8-foot rat balloon near the parking stalls in front of the WP building. A truck with an extended cab circled the parking lot during the activity. The cab carried a 10 foot by 8 foot sign that stated "Lusardi Construction is a rat contractor; No respect for workers, families, or local community; Community Beware."

## III. General Legal Principles Regarding 8(b)(4) Picketing

Traditional union picketing, which usually involves individuals patrolling while carrying placards attached to sticks, has been found to constitute unlawful restraint or coercion of neutral employers under 8(b)(4)(ii)(B) as a mixture of conduct and communication.[5] On the other hand, handbilling alone is not unlawful inducement of neutral employers because the handbills "depend entirely on the persuasive force of the idea."[6]

Thus, traditional "picketing" involves more than mere communication. It is aimed at persuading those who approach the location of the demonstration to take some sympathetic action, such as not entering the facility involved. It is this "signal," which provokes people to respond without inquiring into the information being disseminated, that

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[4] The noise from the bullhorn was loud enough for workers inside to hear. Additionally, tenants in another building complained about the noise.

[5] See generally Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996)(citations omitted).

[6] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II) 485 U.S. 568, 580 (1988)(citations omitted). See also Hughes v. Superior Court, 339 U.S. 460, 464-465 (1950).

distinguishes traditional picketing from other forms of communication and makes it subject to restrictive regulation under the Act.[7]

The Board has stated that "one of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."[8] Along the same lines, "the important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."[9] As a result of requiring an element of confrontation, the Board has found that even union patrolling combined with the display of placards does not amount to unlawful picketing, in the absence of confrontation between union agents and employees or customers.[10]

At the same time, the Board has recognized the importance of the "conduct element" in picketing and the response it invokes regardless of any message. Thus, the concept of "signal picketing" was developed by the Board to describe union conduct that did not involve traditional picketing, but could be characterized as such because it evoked the same response as a traditional picket line. In other words, "signal picketing ... describe[s] activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by

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[7] See Teamsters Local 688 (Levitz Furniture Co.), 205 NLRB 1131, 1133 (1973).

[8] Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965)(emphasis added), quoting NLRB v. United Furniture Workers (Jamestown Sterling Corp.), 337 F.2d 936, 940 (2d Cir. 1964).

[9] Stoltze Land & Lumber Co., 156 NLRB 388, 394 (1965)(emphasis added). See also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

[10] See Alden Press, 151 NLRB at 1669 (picketing along public street but not directed against any specific employers held not unlawful). Accord: Service Employees Local 525 (General Maintenance Service Co., Inc.), 329 NLRB 638, 683 (1999).

the union."[11] By directing such conduct at neutral persons, a union can violate both Section 8(b)(4)(i) and (ii)(B).[12] Additionally, the Board has found that a union can violate Section 8(b)(4)(i) and (ii)(B) by engaging in non-picketing conduct that, while not technically characterized as picketing, "oversteps the bounds of propriety and [goes] beyond persuasion so that it [becomes] coercive to a very substantial degree."[13]

## IV. Analysis for Specific 8(b)(4) Incidents

Legacy Office

We conclude that, absent settlement, complaint should issue regarding the Union's conduct at the Legacy office building on all days because the Union's conduct was not pure handbilling and more than mere speech.

The totality of the circumstances at the Legacy office building demonstrates that the Union's confrontational conduct amounted to unlawful picketing that violated Section 8(b)(4)(ii)(B). The conduct cannot be viewed as mere persuasion through speech directed at Legacy's customers within the meaning of the Supreme Court's decision in DeBartolo II.

On the first day of the Union's conduct, one of its activities was distributing handbills, which in and of

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[11] Operating Engineers Local 12 (Hensel Phelps), 284 NLRB 246, 248 n. 3 (1987)(citation omitted). Accord: Electrical Workers Local 98 (Telephone Man), 327 NLRB 593, 593 and n. 3 (1999)(finding "signal picketing" where, among other things, union agent stood near neutral gate and wore observer sign that flipped over to reveal same sign being used by union picketers at primary gate); Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 562 n. 2, 571-576 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990)(finding "signal picketing" where union supporters stood near picket sign at neutral gate).

[12] See generally Service Employees Local 87 (Trinity Maintenance), 312 NLRB at 743 (citations omitted).

[13] Service & Maintenance Employees Local 399 (William J. Burns Intl. Detective Agency, Inc.), 136 NLRB 431, 437 (1962)(handbillers impeded customer access to neutral employer's premises in a manner that also included element of physical restraint).

itself is not unlawful.[14] However, using the truck with the sign to patrol the parking lot so close to the entrance can be viewed as the equivalent of traditional picketing that is confrontational in and of itself, given that the parking lot and building were only separated by the 40-foot wide plaza.[15] Finally, the timing of the Union's conduct, which began at the time that Legacy's employees reported to work, supports an argument that the Union's conduct was confrontational in nature.[16]

During the following months, the Union's conduct grew even more confrontational as the Union added activities to its first day's conduct. The Union continued to arrive during the time that the employees reported to work and began using bullhorns, yelling slogans, and displaying a rat balloon and/or a person dressed in a rat costume.[17] By mid-October, the Union began including the traditional picketing conduct of marching in circles at locations that confronted neutral persons. The marching in circles took place without traditional picket signs but took place during the time the truck patrolling the parking lot with the large sign was

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[14] The handbill was distributed when no Lusardi employees were present and questioned the decision of Legacy to use Lusardi. Thus, it indirectly enmeshed Legacy into the Union's dispute with Lusardi. This establishes that the Union had a secondary object for the handbilling.

[15] See Painters District Council 9 (We're Associates), 329 NLRB 140, 142 (1999)(sign mounted on automobile equated with picketing); Electrical Workers IBEW Local 98 (Telephone Man, Inc.), 327 at 600 (union violated 8(b)(4)(i) and (ii)(B) by patrolling from primary gate to secondary gate in an attempt to pressure secondary employers at the worksite).

[16] See generally, e.g., Hensel Phelps, 284 NLRB at 248 (finding signal picketing where union failed to explain presence of business agents at neutral gate "during the early morning hours when employees would customarily be reporting for work"); Millmen & Cabinet Makers Local 550 (Steiner Lumber Co.), 153 NLRB 1285, 1286 n. 1, 1289 (1965), enfd. 367 F.2d 953 (9th Cir. 1966)(relying on timing of picketing, i.e., when neutral employees reported for work, in finding unlawful secondary object).

[17] See Construction & General Laborers Local Union 4 (Quality Restorations), Case 13-CC-2006, Advice Memorandum dated January 19, 1996 (purpose of individual dressed as a rat who patrolled in front of association was to confront customers or employees rather than to engage in protected free speech).

present.[18] Moreover, on at least one occasion an agent confronted a Legacy employee for refusing to accept a handbill.[19] Finally, although the Union reduced its conduct in December 2001 and January 2002 to only leafleting, floating a rat balloon and having the truck with the sign present, it was still unlawfully confrontational, given the proximity of the rat balloon and the truck with the sign to the entrance of the Legacy office.

In sum, all of the Union's conduct at the Legacy building, when considered as a whole, was more than pure handbilling or merely free speech. It amounted to confrontational conduct with the objective to restrain or coerce Legacy in its relationship with Lusardi. The Union sent a signal, equivalent to picketing, to those approaching Legacy's office so that they would take some kind of sympathetic action toward Legacy on behalf of the union.[20] Thus, it is not the type of activity protected under DeBartolo II but amounts to at least signal picketing and actual picketing on those occasions when the agents or the truck carrying the sign patrolled the sidewalks or parking lot.

Venture Office

We conclude that, absent settlement, the complaint should also allege the Union's conduct at the Venture office

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[18] See General Maintenance Service Co., 329 NLRB at 680-681 (finding 8(b)(4)(i) and (ii)(B) violations where union agents slowly marched across entrance to neutral parking garage); Painters District Council 9 (We're Associates), 329 NLRB at 142 (finding union engaged in picketing in violation of 8(b)(4)(i) and (ii)(B) where, among other things, union agents confronted automobiles entering common situs).

[19] We also conclude that the Region should allege that this incident was unlawful under Section 8(b)(4)(i)(B) even though the Union may not have intended to induce a work stoppage. See International Brotherhood of Teamsters, et al. (Overnite Transportation Co.), Cases 26-CC-525, et al., Advice Memorandum dated July 13, 2001 [*FOIA Exemption 5*

]; District Council 9 (We're Associates), 329 NLRB at 142 (union's conduct of milling about and confronting neutral employees' vehicles at entrance to facility unlawful under Section 8(b)(4)(i)(B)).

[20] See Operating Engineers Local 12 (Hensel Phelps), 284 NLRB at 248 n. 3.

building violated Section 8(b)(4)(ii)(B)[21] because that conduct was also not pure handbilling and more than mere speech. As with the conduct at Legacy, the totality of the circumstances at the Venture office building also demonstrates that the Union's confrontational conduct amounted to unlawful picketing which cannot be viewed as mere persuasion through speech.

The Union's conduct at the Venture office was the same as or similar to the conduct exhibited by the Union at the Legacy office building. The Union used a similar handbill except the handbill referred to Lusardi and Venture. Also present was a truck with a six-foot by six-foot sign, a person in a rat costume, and slogan shouting. The truck with the sign, driven by Union agents, circled the block while other Union agents walked up and down the sidewalk in front of the building. Given that the entrance to the Venture office was only eight to ten feet from the street and all of this conduct took place in front of the entrance, the same theory of violation as set forth regarding Legacy is applicable here.

As with Legacy, the Union's conduct became more confrontational as the Union returned to the Venture office over a period of a month and a half. During that time, the Union did not handbill or pass out leaflets, but simply showed up shouting slogans with a bullhorn about Lusardi and parking a truck, which towed a sign as before, in front of the Venture office. At no time were any Lusardi employees present. Thus, such conduct amounted to confrontational secondary picketing because the Union brought its dispute with Lusardi to Venture even though Lusardi was not present at the Venture office building.[22] Furthermore, when the Union and Venture met to discuss the activities that were taking place in front of Venture's office, the Union threatened to use whatever means possible to keep Lusardi out of Northern California. Thus, the Union's threat was also unlawful as it was a threat to continue to unlawfully picket at Venture's office until it coerced Venture into ceasing to do business with Lusardi.[23]

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[21] While the Union's conduct on September 26, 2001 only included floating a rat balloon and handbilling with no large signs or other conduct the Union's conduct on that date was unlawful because it was in the context of violative confrontational conduct both before and after.

[22] See, e.g., Painters District Council 9 (We're Associates), 329 NLRB at 142.

[23] [*FOIA Exemption 5*

Finally, the Union's confrontational conduct directed at Venture reached a peak on May 8 when the Union displayed a misleading sign regarding asbestos at a Venture worksite, without mentioning Lusardi. When a union's banner urges consumers or invitees to respond on the misleading basis that a neutral employer is the primary actor in a labor dispute, it is coercive within the meaning of Section 8(b)(4)(ii)(B).[24] The doctrine that misleading signage can transform otherwise lawful union activity into coercive secondary union conduct is well established by the Board.[25] The importance of the language on this sign is that it was being used in an attempt to coerce Venture to cease doing business with Lusardi.

In sum, all of the Union's conduct at Venture, as at Legacy, when considered as a whole, was more than pure handbilling or merely free speech. It also amounted to confrontational conduct with the objective to restrain or coerce Venture in its relationship with Lusardi. Thus, it is not the type of activity protected under DeBartolo II either, but amounts to unlawful confrontational (ii) conduct.

WP Office

We conclude that, absent settlement, the complaint should also allege the Union's conduct at the WP office building violated Section 8(b)(4)(ii)(B) because that conduct was also not pure handbilling and more than mere

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.] We are in agreement with the Region that a reasonable person would understand this statement to be a threat by the Union not only to continue its current conduct but to also conduct additional activities, including unlawful ones. Thus, the Union was attempting to force Venture to cease doing business with Lusardi in violation of Section 8(b)(4)(ii)(B). See Butcher Union Local 506 (Adolph Coors. Co.), 268 NLRB 475, 478 (1983). We also agree with the Region that there is no evidence to support a violation under Section 8(b)(4)(ii)(A).

[24] See Carpenters Local Union No. 1506 (Associated General Contractors of America, San Diego, Chapter, Inc.), Case 21-CC-3307, General Counsel's Minute, dated August 22, 2002 [*FOIA Exemption 5*

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[25] Local 248, Meat & Allied Food Workers, 230 NLRB 189, fn. 3 (1977), enfd. 571 F.2d 587 (7th Cir. 1978).

speech. As with the Legacy and Venture locations, the totality of the circumstances at the WP office building demonstrates that the Union's confrontational conduct amounted to unlawful picketing.

The Union's conduct at the WP office was the same or a similar combination of activities that took place at both Legacy and Venture. The rat balloon, leafleting, the use of a bullhorn and the presence of a truck circling the parking lot with a ten-foot by eight-foot sign was part of the Union's conduct. Here, as at the other locations, the proximity of the conduct to the actual entrance to the office building and the size of the sign on the truck circling in the parking lot was confrontational conduct aimed at any person seeking to enter or leave the neutral employer's parking lot and building. Additionally, the other activities took place in such close proximity to the building that it was also confrontational to any neutral person seek to enter WP's premises. Finally, as with Legacy and Venture, at no time were any Lusardi employees present when this conduct took place.

In sum, all of the Union's conduct at the WP office is no different from that at Legacy or Venture. When considered as a whole, it too was more than pure handbilling or merely free speech. The Union exhibited the same type of conduct with the same objective as at the other two locations.

## V. Facts Regarding 8(b)(1)(A) Incidents

The Union also allegedly engaged in unlawful primary activity in violation of Section 8(b)(1)(A) at Lusardi's San Jose and Morgan Hill worksites. The following incidents took place at those worksites and involved, among others, the Union's representative and primary actor, Tim Lipscomb.

### A. San Jose Worksite

On February 19, 2002,[26] Union agent Lipscomb entered the jobsite to speak with site superintendent Krieg about what he believed to be pollution of the neutral gate. On February 21, Lipscomb returned to the worksite. He entered the property and told Krieg that he was going to conduct a safety inspection. Krieg called the police. When the police arrived, they told Lipscomb that he must leave and Lipscomb left.

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[26] All dates hereafter are in 2002 unless otherwise noted.

On February 25, Lipscomb and another union agent, Bonilla, entered the jobsite through a neutral gate at about 7:30 AM. They told an employee, Lewis Ashcraft (Ashcraft) they wanted to do a safety inspection. Ashcraft told Lipscomb and Bonilla that they needed to get permission from Krieg before conducting an inspection, and that they had no right to be on the jobsite. Ashcraft called the police and a short time later Krieg and a police officer arrived. The officer said that he could arrest Lipscomb and Bonilla for trespassing if Krieg requested that he do so. Krieg did not have them arrested but asked Ashcraft to accompany Lipscomb and Bonilla while they conducted their safety inspection. Lipscomb and Bonilla told Ashcraft that it was against the law for him to follow them on their inspection and if he followed them, he would be named in a lawsuit. On that same day, it is alleged that the Union blocked the primary gate at the site but it is unknown for how long, at what time, whether anyone was actually blocked or if anyone witnessed the blocking of the gate.

On February 28 and March 6, picketers parked a truck in front of the locked primary gate. On March 12, a union agent videotaped an employee while the employee worked near the primary gate. On March 13, the Employer locked the primary gate and assigned a labor employee, Dave Guzman (Guzman), to monitor the gate and to open it when necessary. Guzman opened the gate to allow a truck to enter during which time Lipscomb and Bonilla followed behind the truck in an attempt to enter the worksite. Ashcraft, who had approached the gate after Guzman told him that Lipscomb and Bonilla was outside the gate, attempted to close the gate before Lipscomb and Bonilla could enter. Lipscomb rushed toward the gate shouting that he was coming in and pushed Ashcraft out of his way as he entered the worksite through the gate. Lipscomb threatened to sue Ashcraft if he touched him in an attempt to keep him from entering the property. Lipscomb claimed to have a right to be there to do a safety inspection. Eventually Ashcraft stepped away from the gate at which time Bonilla also entered the property and began videotaping Ashcraft. Lipscomb and Bonilla began walking around the project videotaping. Ashcraft called Krieg and asked him what to do about Lipscomb and Bonilla. Krieg told Ashcraft to call the police and to stay with Lipscomb and Bonilla. During this time, Lipscomb and Bonilla continued to videotape and questioned Ashcraft. When Krieg arrived, he agreed to let the Union agents do a safety walkthrough.

On April 25, two picketers were photographed standing facing a wall and it appears that they may have been urinating on the wall.

B. <u>Morgan Hill</u>

On April 4, several employees heard Lipscomb threaten superintendent Krieg when he yelled, "I'm going to kick your fuckin' ass Krieg." On April 25, Lipscomb entered the jobsite to tell Krieg that one of his men shot a hole in the union's rat balloon with a bottle rocket.

On May 3, Lipscomb entered the jobsite to tell Krieg that an alarm was bothering the picketers. On May 5, picketers blocked Krieg from leaving the worksite by moving slowly in front of the primary gate. There is no evidence that any employees witnessed the blocking of the primary gate by the picketers.

## VI. Analysis Regarding 8(b)(1)(A) Incidents

We conclude, in agreement with the Region, and for the reasons stated by the Region, that no Section 8(b)(1)(A) violations exist regarding the union agents entering the jobsite; videotaping the employee working at the gate; "blocking" a gate when it was locked; allegedly urinating on the Employer's property; conducting safety inspections; or pushing Ashcraft and the implied threat by Lipscomb to sue Ashcraft if he touched him.

We also conclude, in agreement with the Region, but for a different reason, that complaint should issue, absent settlement, alleging a Section 8(b)(1)(A) violation regarding the threat to sue Ashcraft if he escorted union agents during the safety inspection because Ashcraft had a Section 7 right to monitor such safety inspections.

Because safety is a term and condition of employment, employees have a Section 7 right to raise safety issues. Thus, a union cannot restrain the exercise of such a right simply because an individual may be concerned and outspoken regarding safety issues.[27] Here, Ashcraft had a right as an employee to be present out of a concern for his safety and that of the other workers at the worksite, and a threat regarding the inspection would tend to restrain him in exercising that Section 7 right. Thus, we conclude that the

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[27] See generally RGC (USA) Mineral Sands, Inc., 332 NLRB No. 172, slip op. at 5-6 (2001) (no exception on this point), citing Washington Aluminum Co., 370 U.S. 9 (1962) and Daniel Construction Co., 277 NLRB 795 (1985)(safety concern encompassed in the mutual aid or protection under Section 7); see also Building Contractors' Association, Inc., 233 NLRB 267, 270 (1978)(union violated Section 8(b)(1)(A) when it threatened member for being outspoken and critical regarding safety concern).

threat by the union agents was an unlawful attempt to restrain Ashcraft in the exercise of his Section 7 rights.

We further conclude that, absent settlement, complaint should issue alleging Section 8(b)(1)(A) violations regarding the threat of physical harm by Lipscomb to Krieg because the threat was made in the presence of employees; the blocking of the primary gate when Krieg attempted to leave because employees were likely to be made aware of such conduct; and the videotaping of Ashcraft on March 13, because of the agents' conduct before and during the time of the videotaping.

Threats and other acts of intimidation directed at nonemployees may be unlawful under Section 8(b)(1)(A), but only if other employees would be likely to hear about them.[28] Here Lipscomb made a threat to kick Krieg's ass, in the presence of employees. Thus, the conduct amounted to a violation under Section 8(b)(1)(A).[29]

Similarly, with regard to the blocking of Krieg, it is well settled that restraint or coercion of supervisors where the conduct becomes or is likely to become known to both striking or non-striking employees constitutes a restraint or coercion of those employees in the exercise of their Section 7 rights. Here, given the fact that Krieg and his employees work in such close proximity, and given the Union's past conduct at the worksite, it is likely Krieg himself will make the employees aware of the Union's conduct. Thus, although the blocking did not take place in the presence of employees, there is the likelihood that employees will become aware of the incident. Therefore, the blocking amounted to a Section 8(b)(1)(A) violation.[30]

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[28] North American Meat Packers Union (Hormel & Co.), 291 NLRB 390, 395 (1988) citing Teamsters Local 298 (Schumacher Electric), 236 NLRB 428 (1978).

[29] Delran Builders Co., Inc., 307 NLRB 172, 175 (1992) enfd. 993 F.2d 225 (3d Cir. 1993) (threat to "kick your ass" if you take another picture made within earshot of employee violated Section 8(b)(1)(A)). Cf. Culinary Workers Local 226 (Casino Royale, Inc.), 323 NLRB 148, 159 (1997)(no violation because no casino employees were present when threat to "kick this white bitch ass" was made.)

[30] Teamsters Local 115 (Oakwood Chair), 277 NLRB 694, 698 (1985)(blocking of supervisors from entering facility unlawful when employees were on the picket line); Delran Builders Co., Inc., 307 NLRB at 174-175 (blocking of

Finally, the Board has found that videotaping an employee may reasonably tend to restrain or coerce the targeted employee in the exercise of his or her Section 7 rights in violation of Section 8(b)(1)(A) when such conduct takes place in conjunction with other actions indicating that a union might react adversely to employees.[31] Here, Union agents previously threatened employee Ashcraft with a lawsuit. Later, the same agents videotaped him regarding the same issue he was threatened with regarding a possible lawsuit, a safety inspection. Furthermore, given the physical confrontation between Lipscomb and Ashcraft prior to the videotaping, and the fact the Union agents followed Ashcraft to the trailer and questioned him, we conclude such conduct would tend to restrain or coerce Ashcraft regarding the safety inspection.[32]

B.J.K.

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supervisor for several minutes by picketers unlawful 8(b)(1)(A) violation).

[31] Teamsters Local 890 (Basic Vegetable Products), 335 NLRB No. 55, slip op. at 2 (2001).

[32] Culinary Workers Local 226 (Casino Royale, Inc.), 323 NLRB at 148 (picketers videotaped and pretended to videotape casino "greeter", while making harassing anti-Semitic remarks).