

**United Association of Journeymen and Apprentices
of the Plumbing and Pipe Fitting Industry of
the United States and Canada, Local 32, AFL-
CIO and Ramada, Inc. Case 28-CC-784-1(E)**

April 30, 1992

**SECOND SUPPLEMENTAL DECISION AND
ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 27, 1991, Administrative Law Judge David G. Heilbrun issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief, and the General Counsel filed an answering brief, cross-exceptions, and a supporting brief. The Applicant filed a brief in response to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

Section 504(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504 et seq., provides that the adjudicating agency

shall award to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

Section 102.144 of the Board's Rules and Regulations provides in full with respect to standards for awards that:

(a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the

adversary adjudication or if special circumstances make the award sought unjust.

The Supreme Court set forth the standard for determining substantial justification in *Pierce v. Underwood*, 487 U.S. 552 (1988). The Court held that "substantially justified" means "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis both in law and fact." Further, the Court found that the portion of the 1985 House Committee Report, H.R. Conf. Rep. No. 99-120 (1985), defining substantial justification as "more than mere reasonableness" was not an authoritative interpretation of what the 1980 statute meant or of what the 1985 Congress intended.

The judge in this EAJA proceeding found that the General Counsel's position in the underlying unfair labor practice case was substantially justified at each discrete substantive portion of the proceeding and therefore the judge denied in full the Applicant's request for fees and expenses. We agree with the judge that the General Counsel's position was substantially justified¹ at each stage of the case up through and including his position before the Ninth Circuit on appeal. We find, for the reasons set forth below, that the General Counsel was not substantially justified in his position before the Board on remand from the Ninth Circuit.

In the underlying unfair labor practice proceeding, the Board panel adopted the judge's decision finding that the Union (the Applicant) violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act by sending Ramada, Inc., a neutral employer, a letter containing, inter alia, an unqualified threat to picket the Sea-Tac Airport Ramada Inn jobsite.² The Board specifically declined to pass on the judge's finding that the letter's threats to handbill and to organize a consumer boycott were also unlawful.³ The Union appealed the Board's decision to the Ninth Circuit, which reversed the Board and found the threat to picket to be lawful in light of its decision in *NLRB v. Iron Workers Local 433*, 850 F.2d 551 (9th Cir. 1988).⁴ The Ninth Circuit remanded the case to the Board for a determination of the lawfulness of the letter's threats to handbill and organize a boycott.

On remand, the General Counsel maintained the position that the threats to handbill and organize a consumer boycott were unlawful, even in light of *DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988). In *DeBartolo*, the Court found a union's distribution of handbills urg-

¹ Although the judge misstated the proper standard for "substantial justification," we find that his misstatement of the standard does not affect the outcome of this case.

² *Plumbers Local 32 (Ramada, Inc.)*, 294 NLRB 501 (1989).

³ *Id.* at fn. 1.

⁴ *Plumbers Local 32 v. NLRB*, 912 F.2d 1108 (9th Cir. 1990).

ing consumers to boycott neutral employers to be lawful. Specifically, the Court held that Section 8(b)(4) did not cover peaceful handbilling urging a consumer boycott because such activities accomplish their goals by the persuasive force of the ideas they convey, rather than by coercion, intimidation, or restraint. *Id.* at 580. The General Counsel argued, nevertheless, that the handbilling and boycotting threats were unlawful because they were made in the letter that also contained a threat to picket and a reference to “a full scale war with the Ramada Inn as the battlefield.” This argument ignores the fact that the Ninth Circuit declined to accord any weight to the battlefield reference when it found that the letter’s threat to picket⁵ was lawful. *Plumbers Local 32 v. NLRB*, *supra* at 1110. Thus, the Board concluded on remand that because handbilling and boycotting, without more, would not be unlawful under *DeBartolo*, mere threats to engage in handbilling and boycotting in these circumstances could not be found to be unlawful. *Plumbers Local 32 (Ramada, Inc.)*, 302 NLRB 919, 920 (1991). Accordingly, the Board dismissed the complaint.

Given the Supreme Court’s decision in *DeBartolo* and the Ninth Circuit’s conclusive finding in this case that an unqualified threat to picket expressed in terms of battlefield imagery was not unlawful, it was not reasonable for the General Counsel to argue before the Board on remand that the threats to handbill and organize a consumer boycott were unlawful. Accordingly, the Applicant is entitled to reasonable attorney’s fees and expenses limited to the sums the Applicant incurred in representing its position before the Board on remand from the Ninth Circuit and in this EAJA proceeding.

The Applicant’s claim for fees is based on the maximum allowable rate of \$75 per hour, although the Applicant’s attorney Richard H. Robblee’s affidavit states that the rates charged the Applicant during 1990 and 1991 were \$95 per hour. The General Counsel does not dispute the accuracy of the charges or the reasonableness of any item or time spent in performing the services. As indicated above, the claim for fees and expenses incurred prior to the remand is disallowed.⁶ The remainder of the claim, covering the statement of position on remand and the EAJA application, is allowable

⁵Picketing has long been recognized as “a mixture of conduct and communication” and the conduct element “often provides the most persuasive deterrent to third persons about to enter a business establishment.” *Id.* at 580, quoting *NLRB v. Retail Clerks Local 1001 (Safeco)*, 447 U.S. 607 (1980). Clearly then, we cannot find that pure speech activity such as the handbilling and boycott threatened here would be transformed into coercive conduct merely because of the battlefield reference.

⁶This portion of the claim totaled \$6120 for 81.6 hours of legal services provided from August 1988 through September 1990.

and proper.⁷ This award is without prejudice to the Applicant’s right to submit additional or amended claims in the event of further litigation in this proceeding.

ORDER

The Applicant, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 32, AFL–CIO, shall be awarded \$1,878.50 pursuant to its EAJA application.

⁷This portion of the claim totaling \$1,878.50 included 22.7 hours (\$1,702.50) of legal services provided from December 1990 through June 1991 and \$176 for expenses in preparing the EAJA application.

Michael J. Karlson, for the General Counsel.
Richard H. Robblee (Hafer, Price, Rinehart & Schwerin), of Seattle, Washington, for the Applicant.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

DAVID G. HEILBRUN, Administrative Law Judge. On May 31, 1989, the National Labor Relations Board issued its Decision and Order in the above-entitled unfair labor practice proceeding as 294 NLRB 501. My underlying decision in the case was adopted to the extent of a finding that United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 32, AFL–CIO (the Union), violated Section 8(b)(4)(ii)(B) of the Act in one specific regard as to threatened picketing of a secondary employer. The Board expressly elected not to pass on two other findings, these concerning threats to handbill and to organize a boycott.

The Union petitioned the United States Court of Appeals, Ninth Circuit for review of this Decision and Order, while the Board cross-appealed for enforcement. The case was decided as *Plumbers Local 32 v. NLRB*, 912 F.2d 1108 (9th Cir. 1990). The court declined enforcement of the Board’s Order on the “unqualified threat to picket” issue, expressly reversing on this point and remanding for a Board decision on the two other findings not passed upon. A request of the Union for attorneys’ fees under the Equal Access to Justice Act (EAJA) was deemed premature, because a prevailing party in the case had yet to be established.

After considering authorized statements of position from the parties, the Board issued its Supplemental Decision and Order on May 13, 1991, as 302 NLRB 919. The Board accepted the court’s determination regarding a threat to picket as “law of the case,” and then applied its view of *DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988). The resultant holding was that the Union did not “coerce” any person within the meaning of Section 8(b)(4)(ii)(B) by either the threatened handbilling or organizing of a boycott, and on these grounds dismissed the entire complaint.

Basis of Application

The essential background facts are not in dispute. As traced by a concise summary in the Board's Supplemental Decision and Order, Ramada, Inc. hired Baugh Construction Company in May 1987 as general contractor to build a Ramada Inn Hotel at Sea-Tac Airport in the State of Washington. Baugh soon subcontracted plumbing and mechanical work on the project to Chapman Mechanical, Inc., a non-union firm. Upon learning of this choice the Union's business manager, Floyd Sexton, first communicated his disappointment to Baugh. Subsequently Sexton wrote to Ramada's chief executive at Phoenix, Arizona, on July 31, 1987, providing copies of his communication to officials of Baugh. This entire letter was set forth verbatim in my underlying decision, in the reversal and remand holding of the Ninth Circuit, and in the Board's Supplemental Decision and Order. The material passages of Sexton's letter stated his principal's objection to Chapman, and what he proposed to "establish" in reaction to this nonunion firm readying to perform its work. The imminent undertakings envisioned by Sexton were to be (1) "aggressive and continuing picketing," supported if possible by the Seattle area building trades, (2) a request by the Union for its "affiliate groups to join with us in not patronizing the Ramada Inns," and (3) "a handbilling program to notify prospective customers of problems with the Ramada Inn." Additional passages shall be treated below.

Ramada gave its owner's final approval to Baugh's selection of Chapman on September 29, 1987, and soon afterward filed a charge against the Union under Section 8(b)(4)(ii)(B). A complaint was issued pursuant to this charge on November 13, 1987. When the matter was tried at Phoenix, Arizona, on January 26, 1988, counsel for the General Counsel made an opening statement in which several points were stressed. The litigation was cast as all "center[ing]" around Sexton's letter, a writing as to which "several elements" allegedly violated 8(b)(4)(ii)(B). The following five point presentation was made at Transcript 13-14:

1. Sexton's letter threatened to establish a picketing program at the jobsite, and with intended support from Seattle Building Trades all "in the context of . . . a consumer boycott."

2. The letter lacked any assurance that picketing would be conducted lawfully.

3. The letter threatened to request that "affiliated groups" not patronize "the Ramada Inns." Here Counsel for the General Counsel's opening statement noted plural wording of Ramada Inns, contrasting this with the only one involved being that under construction at Sea-Tac Airport as part of general business expansion plans.

4. The letter threatened that handbilling would notify prospective customers of the Union's "problems with the Ramada Inn." In this regard CCounsel for the General Counsel noted that Ramada was a neutral employer, and two steps removed from the nonunion subcontractor to which the Union objected.

5. The letter concluded with legally significant rhetoric terming the Union's rebuff a prelude to "full scale war with the Ramada Inn as the battlefield."¹

The Union (Applicant) filed for an EAJA award of attorneys fees and expenses on June 10, 1991. Applicant's twofold theory is, first, that while this case was pending at the Board on the Union's exceptions and related papers of the parties *NLRB v. Iron Workers Local 433*, 850 F.2d 551 (9th Cir. 1988) was decided. The Applicant summarized *Iron Workers 433* as holding that a picketing threat directed to a secondary party was not a violation of the Act simply because the union involved did not qualify its threat by an assurance of only lawful picketing. It is argued that after issuance of *Iron Workers 433*, a Federal appeals court decision assertedly binding on the Board because of the Ninth Circuit's geographical scope, General Counsel had no basis in law to continue prosecuting the complaint on the issue of a threat to picket.

Secondly, Applicant contends that with this issue removed by the reversal and remand, the thrust of *DeBartolo* materialized so as to necessitate dismissal of the handbilling and boycott issues previously passed over. *DeBartolo* is termed "dispositive" on both issues, and requiring the Board at that point to voluntarily withdraw its Decision and Order as a correct response to the remand. This second contention also expressly includes the point that General Counsel's continuing prosecution of the case to secure supplemental adjudication on the remanded issues was, equally to the Board's inaction, without substantial justification.

Court Decisions

Certain background decisions of the United States Supreme Court bear heavily on the merits of this EAJA application. *Labor Board v. Servette*, 377 U.S. 46 (1964), and *NLRB v. Fruit Packers*, 377 U.S. 58 (1964), were decided by the Court in tandem. Relative to an issue arising under subsection (ii) of Section 8(b)(4), *Servette* held that the "publicity" proviso protected a union's dissemination of handbills seeking public support in a primary strike. The Court found statutory protection because a wholesale distributor of goods, the party with whom the union had its actual dispute, was within the meaning of "producer" of such distributed goods as that word appears in the proviso. The handbilling (and threatened handbilling) involved was only to be applied with retailers that did not heed the union's persuasion not to handle products of the primary. On these grounds the Court expressly found that a threat to engage in activity which is itself protected could not be unlawful, and for this reason a warning to the retail store managers that handbilling might be undertaken at their locations was not prohibited conduct within subsection (ii).

¹ Sexton's letter had interwoven his dismay and frustration in realizing that the nonunion Chapman firm was about to commence this "first major job" in the classifiably metropolitan King County in which the Union's own office is located. Sexton had termed Chapman's "substandard [wage] rates" paid to its nonunion workers as "a serious threat to the standard of living enjoyed by our members," that its workmanship was poor, and that he had been denied the opportunity to meet with representatives of Baugh concerning the matter.

Fruit Packers held that peaceful secondary picketing of retail stores with the expressly limited intention of successfully inducing a consumer boycott of products sold through such stores was not prohibited by subsection (ii). The Court's review of legislative history convinced it that prohibition of all consumer picketing at a secondary site was not shown by a "clearest indication" from the Congress. Further the Court considered peaceful consumer picketing seeking only to persuade retail customers not to buy a struck product, and that which sought to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, creates a distinction that is "poles apart" in significance. The semantic problem of the phrase "other than picketing" as used in the proviso was treated by the Court deeming that the spirit of the statute, and not necessarily its letter, should better control here. *Fruit Packers* at 71-72. This closing component of the Court's rationale also disposed of a point that such economic loss as might befall a retailer from the picketing could not supersede a strong policy consideration found to be present. This policy consideration was the consistent refusal of Congress over the entire "history of federal regulation of labor relations" to prohibit peaceful picketing, except when "isolated evils" plainly not present in *Fruit Packers* were targeted for elimination.

DeBartolo was a final resolution of litigation heavily overlain with first amendment concerns. For the Board's part it applied a longstanding position that constitutionality of the Act should be presumed, and from this held that appealing by handbills to the public to stop patronizing secondary employers violated the Act. The reasoning followed was that such appeals brought coercive economic retaliation upon secondary employers, and was therefore unlawful under the literal language of Section 8(b)(4)(ii)(B). As carried again to a court of appeals the case was viewed as harboring serious doubts about the constitutionality of banning peaceful handbilling. This resulted in a review of legislative history by the court of appeals within the doctrine of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), from which no congressional intent was perceived to consider that nonpicketing appeals by handbilling only would constitute activity to threaten, coerce, or restrain as these words were used in subsection (ii).

After a grant of certiorari the Court affirmed finding an acceptable statutory construction that resulted in avoidance of any constitutional problems. Thus the Court first considered whether prior reviews of legislative history reflected "with requisite clarity" any congressional intent to ban all peaceful consumer picketing at secondary sites. The Court noted *Fruit Packers* as not so indicating, and the earlier *NLRB v. Drivers*, 362 U.S. 274 (1960) case in regard to peaceful recognition picketing (emphasis added). Turning then to the merits, the Court termed elements of "threats, coercion, or restraints," as used in subsection (ii) to be, quoting *Drivers*, "nonspecific, indeed vague," and required caution that they not be given a broad sweep. The Court assessed case facts about leaflets handed to customers of the stores operating in DeBartolo Corporation's shopping mall, and found that "no suggestion" of a coercive effect on mall customers was shown. Additionally, that "no violence, picketing or patrolling" accompanied the attempted persuasion. The Court emphasized how picketing differs "qualitatively" from other forms of communication, and how handbilling is a technique

depending "entirely on the persuasive force of an idea." From this it reasoned that Section 8(b)(4)(ii)(B), standing alone, lacked any clear indication that handbilling "coerces" secondary employers. This seemed so because any loss of patronage is not from intimidation, but merely the honest reaction of customers to the power of persuasion.

As to the publicity, or second, proviso involved, the Court found it gave a "clarification of meaning" to Section 8(b)(4), rather than a general ban on consumer publicity. The Court's opinion lead into such discussion by noting the proviso's "different ring." The opinion concluded by holding that the most significant Senate colloquy on the Landrum-Griffin Bill, coupled with "other bits of legislative history relied on by the Board," fell far short of revealing a "clear intent" by the Congress to mean that all nonpicketing appeals to customers urging a secondary boycott were unfair labor practices unless protected by express words of a proviso.

The essential facts of *Iron Workers 433*, as applicable here, are that a union business agent telephoned a construction official long familiar to him from other dealings and vociferously protested the subcontracting of steel erection to a nonunion company. The business agent concluded his remarks by saying he would picket to stop the subcontractor's work, and from this the Board held that secondary boycott provisions of the Act would be violated by such threatened picketing. On this branch of the case, the Ninth Circuit held that because the secondary employer's construction official well understood that any picketing would be directed only to steel erection work, it was not necessary for the business agent "to invoke a particular incantation" of lawful intent. On this basis the court held it beyond the Board's authority to conclusively presume that a common situs picketing threat would have an unlawful purpose, unless the union qualified its intention with an assurance of intended compliance to law.

Motion to Dismiss

On July 12, 1991, counsel for the General Counsel filed his motion to dismiss application pursuant to Section 102.150 of the Board's Rules and Regulations. The motion was in three parts. The first contention was that Applicant failed to establish its EAJA eligibility under Section 102.143(g) because of not taking into account the net worth and employee complements of Seattle building trades organizations or other "affiliate groups." Second, General Counsel claims substantial justification in all aspects of the litigation by the presence of a reasonable basis in both fact and law to press it in all phases. Third, it was asserted that special circumstances exist to deny Applicant, because at least General Counsel's role was in good-faith advancement of credibly novel extensions and interpretations of law.

Applicant's Response

On August 1, 1991, Applicant timely filed its reply brief, with a further supporting affidavit. On the matter of EAJA eligibility the Union denied it was under such outside control as to warrant an aggregation of jurisdictional facts. As to substantial justification, Applicant contended that issuance of *Iron Workers 433* was the point from which EAJA recovery should be measured. Applicant argues that with the issue of

a threat to picket effectively removed from the case, *DeBartolo* rationale concerning a merely persuasive character of handbilling and boycott intentions required an immediate cessation of the Government's prosecution. As to claimed special circumstances, Applicant urges that none be found, and that the true understanding was how a "stubborn refusal" of case reevaluation demonstrated absence of substantial justification in the positions taken by General Counsel during this adversarial proceeding.

Discussion

A. Applicant's Eligibility

Under 5 U.S.C. § 605 (b)(1)(B) an organization with net worth not exceeding \$7 million and not having more than 500 employees, is basically eligible for an EAJA award. General Counsel's argument that other entities should be aggregated is unavailing. While Applicant bears the burden of proof as to its eligibility, this does not warrant speculation that because it once expressed the prospect of cooperative action to institutionally further trade unionism this meant an aggregation should follow. *Pacific Coast Metal Trades District Council (Foss Shipyards)*, 295 NLRB 156 (1989) involved a plain showing that Applicant's councils were "creatures" of their constituent local unions, and so controlled both financially and functionally. In contrast here a free standing local union is the party, and Sexton's references to what he might do in engendering support throughout his labor community does not change the character of his principal. I find that Applicant qualifies under the EAJA statute on the basis of net worth under \$1 million and the employment of only 13 persons. Cf. *Leeward Auto Wreckers*, 283 NLRB 574 (1987); *Lathers Local 46 (Building Contractors)*, 289 NLRB 505 (1988); *Grason Electric Co.*, 296 NLRB 872 (1989). See *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983).

B. Substantial Justification

Section 102.144 of the Board's Rules and Regulations provides that an eligible applicant who prevailed in litigation may receive an award of fees and expenses unless "the position of the General Counsel over which the applicant has prevailed was substantially justified." In *Pierce v. Underwood*, 487 U.S. 552, 566 fn. 2 (1988) the Court stated that the term "substantially justified" means:

Justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. That is no different from the reasonable basis both in fact and law formulation adopted by . . . the vast majority of Courts of Appeals that have addressed this issue.

The Court interplayed "substantially" and "reasonably" as adjectives modifying "justification," explaining that "a position can be justified even though it is not correct," and "substantially" so if a reasonable person *could think it correct*, that is having "a reasonable basis in law and fact." The Board has associated this rationale to the intent of Congress when revising EAJA as done by amendatory Pub. L. 99-80 (1985), in clarifying reiteration that "substantial justification" means more than "mere reasonableness." *Country*

Epicure, 279 NLRB 807, 809 fn. 6 (1986); *Janson Distributing Co.*, 291 NLRB 801 (1988).

In this context I believe General Counsel was substantially justified in proceeding as it did, both subsequent to issuance of *Iron Workers 433* in this circuit and in the face of *DeBartolo*. As to the issue of threatened picketing the Board footnoted its brief adoption of a finding of violation by reference to *Retail Union District 65 (Eastern Camera)*, 141 NLRB 991 (1963). This case was a consolidated proceeding on CB, CC, and CP docketed charges. *District 65* has been cited various times after being rendered, but typically so on the Section 8(b)(7) issue of the case and to a lesser extent regarding the 8(b)(1)(A) issues. The Board has never relied on *District 65* in any opinion of its own relating to Section 8(b)(4)(ii)(B), and only once gave short form adoption to an administrative law judge's decision on the point. This occurred in *Exterminators & Fumigators Union Local 155*, 181 NLRB 177 (1970), where a threat to picket was found as clearly constituting restraint and coercion. This was in the context of a union's objective being to bring pressure upon a customer of the business with which it had its recognitional dispute, unless such customer and secondary employer ceased doing business with the primary, thus creating the violation of Section 8(b)(4)(ii)(B) as found. Finally in *Painters Local Union No. 720*, 156 NLRB 317 (1965), a trial examiner held, citing *District 65*, that the alleged violation was established when a union threat to picket a construction job in progress with an object of forcing or requiring the general contractor, a secondary employer, to cease doing business with a subcontractor was shown. The Board reversed this holding, but only on the factual issue that insufficient evidence existed to show the statutorily proscribed objective of the threat, as opposed to another objective relating to compliance with terms of a collective-bargaining agreement in effect between the union and the primary employer. On this basis the Board dismissed the complaint without comment on *District 65* as precedent.

Nevertheless I do not see why General Counsel should be faulted solely because a basis in precedent used by the Board is of the barest kind. The distinguishing of *Iron Workers 433*, the issuance of which was promptly brought to the Board's attention by Applicant, was not done with the recklessness that is intimated. In *Iron Workers 433* all that appeared imminent was a union's construction jobsite picketing, with an extremely specific and emotionally charged intention. This intention was to vigorously prevent any progress by the non-union firm on the steel erection phase of its subcontracted work. Notably the Court gave this announced intention a colloquial gloss, by writing that the secondary employer's official had from past dealings with the business agent "no difficulty in understanding" him.

There is considerable contrast between this localized dispute, with personal familiarity of those between whom verbal communication passed and the tangible reference to a specific phase in construction, and, on the other hand, Sexton's worry inducing letter written suddenly to a business executive headquartered over 1000 miles away. Thus, regarding *Iron Workers 433*, the reason there was "no evidence" here of potentially unlawful picketing is because there was no *exchange*. The Board must take the facts of a case as they are. Sexton chose to write not telephone. The facts of *Iron Workers 433* show that a business official was called an

“asshole” for commissioning nonunion work, and that the threatened picketing would keep “Pat” (given name only) from achieving even the graphically emphasized putting up of a single “piece of steel.” Such earthy communication contrasts sharply with the Sexton letter, one in which dimensions of time, place, force marshalling, and depth of determination are all tantalizingly intimated with militant imagery. Cf. *Local 332 (C.D.G., Inc.)*, 305 NLRB 298 (1991). I do not find that General Counsel lacked substantial justification in considering that *Iron Workers 433* could be distinguished by the Board while this case was still under submission, or that the actual distinguishing of it done on May 31, 1989, was so legally defective that General Counsel should disassociate.

There remains the question of how *DeBartolo* should have been viewed. It would be well to first elaborate on what was once termed the “peaceful persuasion” context in which the Court meant its decision to be taken. In the course of its opinion the Court wrote of “peaceful handbilling,” facially “expressive activity” by a union, the absence of “violence, picketing, or patrolling,” and again “peaceful” handbilling at *DeBartolo*, 575, 576, 578 and 584, respectively. Further *DeBartolo* tended to invite distinguishing by emphasizing the “nonspecific—indeed vague” (emphasis added) way of describing forbidden conduct in the words “threaten, coerce, or restrain.” This was compounded by terming the proviso as having a “ring,” such being a communication of what seems, not what is, and the perplexing interpretation that language in a statute is clarifying in nature rather than definitional or operative. *DeBartolo* relied heavily on both *Servette* and *Fruit Packers* as guidance in the correct analysis of legislative history. Yet as in *DeBartolo* itself, the opinions in these older cases bore their own seeds of potential distinguishing.

It is true that “free wheeling” of expression has been condoned by the United States Supreme Court in a labor relations context. This is exemplified in *Letter Carriers v. Austin*, 418 U.S. 264 (1974), in which a labor organization plagiarized Author Jack London in associating a horrid, if not un-Christian persona, to various unrepresented employees of the United Postal Service. In so holding the Court applied *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), a case rooted in libel action filed in a state court. On the other hand *NLRB v. Gissel Packing Co.*, 395 U.S. 575 at 617, 620 (1969), cautions against the force of “intended implications” made in the “context of a labor relations setting.” Here the court quotes languages from *Wausau Steel Corp. v. NLRB*,

377 F.2d 369 (7th Cir. 1967), illustrating how “conscious overstatements” may have misleading impact.

But everything said in *Letter Carriers* smacks of legally analyzing approbations; a distinct technique (e.g., use of “epithets”) when contrasted with the martial specter found in Sexton’s word choices of “war” and “battleground.” To insult, classify, or abrogate a person is a static phenomenon; that is a casting forth of despicable labels in the interests of making such person so loathsome that the cause being impaired by such person is unfairly disadvantaged. This static condition is in sharp contrast to starkly militant implications. The critical difference is the element of violence, or at least fear of an unknown intention coupled with an unassessable capacity for pressures outside the bounds of accepted ideological conflict. It is this fear, worrisome at least and agonizing at best, that creates the presence of a “threat” given fair meaning of that word.

It is not known whether General Counsel’s representatives were merely abstractly offended by Sexton’s choice of strident words. That would not even be the point; it would be instead the issue of whether the presence of such words warranted a litigation position exploring whether this feature stripped an otherwise permissible pronouncement of handbilling and boycotting intentions of an irredeemably lawful character. As above I cannot hold General Counsel to a lack of substantial justification, when for ample reason the Board could have skirted *DeBartolo* and when finally dealing directly with the handbilling and boycotting issues finding a violation as to one or both of them. Cf. *Quality C.A.T.V.*, 302 NLRB 449 (1991).

C. Special Circumstances

General Counsel asserts that special circumstances exist, within the “safety valve” intention of Congress that reasonable law enforcement efforts not be chilled. The “safety valve” concept was described in intensive detail in *Leeward Auto*, supra, at 577–578 under the heading of “Substantial Justification.” Here *Wyandotte Savings Bank*, 682 F.2d 119 (6th Cir. 1982) is relied on by General Counsel, as routinely cited in that passage from *Leeward Auto*. I see no factor present other than that this contention merges into the more general notion of substantial justification. While the case was unusual in several procedural regards, I would not classify the action (or inaction) of General Counsel to be special circumstances within the fair meaning of EAJA as presently constituted.

[Recommended Order omitted from publication.]