

No. 07-4679

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**METROPOLITAN REGIONAL COUNCIL OF CARPENTERS,
SOUTHEASTERN PENNSYLVANIA, STATE OF DELAWARE
AND EASTERN SHORE OF MARYLAND, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA**

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order issued against the Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania,

State of Delaware and Eastern Shore of Maryland, United Brotherhood of Carpenters and Joiners of America (“the Union”). The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over the case under Section 10(e) of the Act (29 U.S.C. § 160(e)), the unfair labor practices having occurred in Pennsylvania.

The Board’s Decision and Order issued on October 18, 2007, and is reported at 351 NLRB No. 51. (A 5-16.)¹ That Order is final under Section 10(e) of the Act. The Board filed its application for enforcement on December 14, 2007. That filing was timely because the Act imposes no time limits on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s findings that the Union violated Section 8(b)(4)(ii)(B) of the Act when it threatened neutral employers that it would engage in picketing with an unlawful secondary objective.

¹ Citations to A refer to pages of the Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether the Board acted within its discretion in remedying these violations and is entitled to enforcement of its Order in full.

STATEMENT OF THE CASE

Acting on separate charges filed by employers Adams-Bickel Associates, Inc. (“Adams-Bickel”) and Penn Valley Constructors, Inc. (“Penn Valley”), the Board’s General Counsel issued a complaint alleging that the Union violated Section 8(b)(4)(ii)(B) of the Act. Following a hearing, an administrative law judge found merit to the General Counsel’s allegations and issued a decision and recommended order (A 5-16), to which the Union excepted. The Board issued a decision affirming the judge’s findings and adopting his recommended order. (A 5.)

STATEMENT OF FACTS

I. THE BOARD’S FINDINGS OF FACT

A. The Union’s History of Unlawful Conduct

As discussed below (pp. 28-32), for purposes of determining the proper scope of the remedial order here, the Board considered the Union’s long history of violating Section 8(b)(4)(ii)(B) of the Act. (A 12-14.) As detailed here, over the last 8 years, the Union has committed nine Section 8(b)(4)(ii)(B) violations by engaging in various unlawful activities including threats, picketing, excessive sound amplification, and mass demonstrations.

(A 12-14.) In each instance, the Union targeted neutral employers in an effort to embroil them in labor disputes to which they were not parties. (A 12-14.)

The first two instances occurred during the summer of 1999. First, the Union targeted a neutral apartment owners' association in an effort designed to force the neutral company to cease doing business with a nonunion contractor. *Carpenters (Society Hill Owners' Assn.)*, 335 NLRB 814 (2001). The Union used a sound amplification system at excessive volume levels to coerce compliance with the Union's unlawful objective. *Id.* at 826-28. Second, the Union directed similar actions, coupled with an unlawful threat, at the neutral owners of another apartment building. *Ibid.* The Union's objective was to cause these companies to cease doing business with a firm performing window replacement work at the apartment. *Ibid.* On August 27, 2001, the Board issued its decision finding that these actions violated Section 8(b)(4)(ii)(B) of the Act and imposing a cease-and-desist order. *Id.* at 814-16. This Court subsequently enforced that order. *Metropolitan Regional Council of Philadelphia & Vicinity v. NLRB*, 50 Fed.Appx. 88 (3d Cir. 2002) (No. 01-3973, No. 01-4340).

The Union committed another violation while the first two cases were pending before the Board. In January 2001, the Union engaged in unlawful

picketing at a jobsite where Adams-Bickel was engaged as a general contractor. (A 13; 87-88.) The object of the Union's picketing was to force Adams-Bickel to cease doing business with one of its nonunion subcontractors. (A 13; 88.)

On November 2, 2001, shortly before the Board issued its first cease-and-desist order against the Union, the Union threatened a general contractor that it would picket the company's jobsite with the objective of forcing the general contractor to cease doing business with one of its subcontractors. (A 13; 92-94.) The Union subsequently picketed the site and targeted neutral employers, including Adams-Bickel. (A 13; 93.)

The Union continued to violate Section 8(b)(4)(ii)(B) of the Act throughout 2002. On February 8 and 11, 2002, the Union engaged in secondary picketing at a jobsite involving the renovation of a United States Army Reserve Center with an objective of forcing a neutral mechanical contractor to cease doing business with an environmental contractor, and forcing the environmental contractor to cease doing business with a construction company. (A 13; 101-103.) Then, on March 7, 2002, the Union engaged in unlawful secondary picketing at a restaurant with the objective of forcing the corporation that owned that restaurant to cease doing business with a building contractor. (A 13; 95-97.) Finally, on July 2 and 3,

2002, the Union engaged in unlawful picketing at a building renovation project, blocking ingress to that site. (A 13; 98-100.) An object of this secondary activity was to force the building management company to cease doing business with a flooring contractor. (A 13; 99.)

On August 20, 2002, the Union entered into a settlement stipulation designed to resolve the allegations concerning the conduct that occurred in November 2001 and throughout 2002.² (A 13; 63-87, 77.) That settlement provided for issuance of narrow cease-and-desist orders and the posting of notices. (A 13; 70-73.) The settlement also provided that “the signing of this Stipulation . . . does not constitute an admission that [the Union] has violated the Act,” but continued:

[the Union] agrees that for purposes of determining the proper scope of an order to be entered against it in any future proceeding before the Board or a Court in which the Board or its General Counsel is a party, the Board Order and Court Judgment issued pursuant to this Stipulation shall have the same force and effect as a litigated adjudication of the Board enforced by a U.S. Court that [the Union] engaged in the conduct alleged in [the relevant complaints].

² The Board inadvertently omitted reference to the case involving the environmental contractor when describing the scope of the August 20, 2002 settlement. (A 12). The language of that settlement stipulation, however, makes clear that that case was included within the settlement’s scope.

(A 12 n.24; 76.) On April 8, 2004, the Board approved the settlement stipulation and issued an appropriate order. (A 13; 49-62, 57.) On September 30, 2004, this Court entered a judgment enforcing the Board's order. *NLRB v. Metropolitan Regional Council of Philadelphia & Vicinity*, No. 04-2795; (A 13; 40-48, 44).

The very next day, October 1, 2004, the Union engaged in unlawful secondary activity, including the massing of demonstrators, amplification of loud music, and aggressive handbilling, at a private girls' school. (A 13; 126-30.) The purpose of this secondary activity was to force the school to cease doing business with a construction contractor. (A 13; 127-28.) On July 5, 2005, the Union entered into a formal settlement stipulation covering this conduct. (A 13; 119-25, 124.) That settlement provided for a narrow cease-and-desist order and remedial notice posting. (A 13; 122-23.) It also contained language identical to that quoted above from the prior settlement stipulation. (A 12 n. 24; 121.) The Board issued a Decision and Order effectuating the settlement on June 9, 2006. (A 13; 111-18.) This Court enforced that order on October 31, 2006. *NLRB v. International Brotherhood of Electrical Workers, et al.*, No. 06-4271; (A 13; 104-10).

Approximately 6 months after the Union entered into that settlement, the ninth instance of unlawful secondary activity occurred. On January 17

and 20, 2006, the Union picketed a jobsite on Kimball Street in Philadelphia and an office in Sicklerville, New Jersey. (A 13-14; 153-60.) Among the objectives of this activity was to force several neutral construction corporations to cease doing business with one another and with certain of their subcontractors. (A 14; 155.) The Union resolved these issues by formal settlement stipulation on May 11, 2006. (A 14; 142-50.) That settlement also provided for a narrow cease-and-desist order and notice posting, and also contained the “order scope” language quoted above. (A 12 n.24, 14; 144-47.) The Board approved the settlement on August 1, 2006. (A 14; 136-41.) This Court enforced the Board’s order on October 31, 2006. *NLRB v. Metropolitan Regional Council of Carpenters*, No. 06-3790; (A 14; 131-35).

B. The Instant Case

1. The Union Threatens Chesnut Partners that There Will Be “Problems”

421 Chesnut Partners LP (“Chesnut Partners”) is a limited partnership formed to develop the property at 421 Chesnut Street in Philadelphia, Pennsylvania. (A 6; 180.) That project, which began in 2004, included the conversion of an old bank building’s upper floors into residential condominium units. (A 6; 180-81.) Chesnut Partners built out the building’s infrastructure and common areas, but did no work inside the

condominium units. (A 6; 181.) Instead, Chesnut Partners delivered “raw space” to the owners of the individual units, who in turn selected and contracted with their own architects, designers and other contractors to perform work on those units. (A 6; 181.)

Chesnut Partners hired two firms to perform the work on the infrastructure and common areas. (A 6; 181.) Cyma Builders was responsible for the major building systems such as electrical, plumbing, elevators, and heating. (A 6; 181.) Aloia Construction performed work on the front unit of the fifth floor, the west stair tower, and a small addition on the sixth floor. (A 7; 182.) These firms employed union labor. (A 7; 182.)

By 2006, development of the building had progressed to the point that individual condominium owners were performing the work on their units. (A 7; 182.) Adams-Bickel was hired by the owners of two of the condominium units. (A 7; 182.)

In late April 2006, members of a union representing employees involved in elevator construction picketed the Chesnut Street jobsite. (A 7; 183.) Around the time of the picketing, Chesnut Partners principal Todd Strine received some telephone messages from Union agent Bruce Jones. (A 7; 183.) In those messages, Jones indicated that he had “several issues” he wanted to discuss with Strine. (A 7; 207.) Strine returned Jones’s calls in

early May and asked why Jones had called. (A 7; 183.) Jones told Strine that he was an official with the Union and that “he had issues to discuss about 421 Chesnut Street.” (A 7; 183.)

After a brief discussion of the elevator picketing, Jones changed topics by asking, “What if, out of the blue, Adams-Bickel is going to be my problem regardless?” (A 7; 183-84.) Strine asked him why, and Jones responded that “they’re using unfair contractors,” that is, “contractor[s] that [aren’t] paying the prevailing wages.” (A 7; 184.) After some discussion about the concept of unfair wages, Jones said: “If that’s the way that it’s going to go the building is going to have a problem.” (A 7; 184-85.) Jones explained that, by “problem,” he meant “protests, work stoppages and problems with deliveries.” (A 7; 185.)

Strine asked what could be done to avoid those problems. (A 7; 185.) Jones then indicated that “the problems went beyond problems with the [Union]” (A 7; 185.) Jones explained his understanding that other trades might also be unhappy with Adams-Bickel because they might not be eligible to bid for work with Adams-Bickel, and his concern that those other trades could create further issues for Jones to deal with. (A 7; 185.)

After another brief discussion of the situation involving Aloia and the elevator union, Jones “turned the subject back to Adams-Bickel and the idea

of the unfair contractors.” (A 7; 186-87.) Jones said, “Look, if Adams-Bickel is in there and there’s going to be a fight, it’s going to go one way and it’s not going to be a good way.” (A 7; 187.) Strine responded to this comment by reiterating that Chesnut Partners had done “98 percent” of its work on the project using union labor. (A 7; 187.) Jones countered: “We’re aware of that. We know that initially you did the right thing and we just want you to use some of your juice to convince Adams-Bickel to use fair contractors.” (A 7; 187.) After Strine again questioned Jones’s reasons for contacting him, Jones reiterated his earlier demand: “I want you to think about using your juice and talking to Adams-Bickel.” (A 7; 188.)

2. The Union Threatens Penn Valley That a Truck Carrying Non-Union-Made Product Will Not Be Unloaded

Penn Valley is a general contractor in the construction industry. (A 8; 229.) In 2006, Penn Valley was involved with a project at Second and Chesnut Streets in Philadelphia, where it was general contractor on the construction of a brewery. (A 8; 228-29.) Penn Valley contracted out all of the work on the project to subcontractors. (A 8; 229.) The subcontractors that were working at the jobsite employed union labor. (A 8; 229.) Penn Valley contracted with a nonunion firm, American Millwork Cabinetry, Inc. (“American Millwork”), to manufacture cabinetry, bar tops and fronts, and

wall panels for the brewery. (A 8; 229.) While American Millwork made the woodwork, it hired a subcontractor to perform the delivery and installation. (A 8; 212.) That subcontractor, P.A. Fly Contracting, Inc. (“PA Fly”), employed workers represented by the Union. (A 8; 213.)

The Union had unsuccessfully sought recognition from American Millwork since 2005. (A 8; 214-17, 219-22.) In late 2006, the Union twice contacted George Reitz, owner of American Millwork, in an effort to obtain recognition from the company. (A 8; 214-17.) During one of those conversations, held on December 5, 2006, Jones told Reitz that “there was going to be a picket line” and that the Union would not unload any cabinetry from American Millwork unless it became “a union shop.” (A 8; 216-17, 220-21.)

That same day, Jones approached Penn Valley superintendent George McCardle at the worksite. (A 8; 230.) Jones told McCardle that he and another Union business agent were in contact with American Millwork and were being “jerk[ed]” around. (A 8; 230.) McCardle asked Jones what he meant and Jones replied: “If an agreement isn’t worked out between American Millwork and the Union the truck’s not getting unloaded.” (A 8; 230-31.) Jones then said, “my men are not going to unload that truck [carrying the custom case work manufactured by American Millwork] if

something's not worked out between American Millwork and the Union.” (A 8; 231.) Jones then asked McCardle to call American Millwork and see if there was something he “could do about it.” (A 8; 231.) In McCardle’s view, such a picket line would effectively cause a complete stoppage of work “because everybody was on – union and if there’s a picket line every – we lose everybody....” (A 8; 231.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Schaumber and Walsh), in agreement with the administrative law judge, found that the Union violated Section 8(b)(4)(ii)(B) when Jones threatened Strine and again when Jones threatened McCardle with unlawful secondary motives. (A 5, 9-11.) To remedy these violations, and because the Board found that the Union had a proclivity to violate Section 8(b)(4)(ii)(B) of the Act, the Board issued an order requiring the Union to cease and desist from engaging in the unlawful activity it committed in this case, and to cease and desist from “in any other manner engag[ing] in conduct prohibited by Section 8(b)(4)(ii)(B) of the Act that is directed at neutral employers” with unlawful secondary objectives. (A 15.) Affirmatively, the Order directs the Union to post a remedial notice. (A 15.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Board counsel is not aware of any related cases pending before this or any other court.

SUMMARY OF ARGUMENT

The Board's Order should be enforced in its entirety. Substantial evidence supports the Board's finding that Jones threatened Chesnut Partners and Penn Valley, and that he did so with unlawful secondary objectives. The Union offers nothing other than strained interpretations of the undisputed testimony in its unsuccessful effort to undermine the Board's reasoning. Further, the issuance of a broad cease-and-desist order is fully justified because the Union's history of Section 8(b)(4)(ii)(B) violations demonstrates its proclivity to unlawfully embroil neutral employers in the Union's labor disputes, and its utter disregard for the right of neutral employers to be free from labor disputes not their own. The Union's course of conduct makes clear the danger of future violations if its unlawful secondary activities are not broadly enjoined.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT WHEN IT THREATENED NEUTRAL EMPLOYERS THAT IT WOULD ENGAGE IN PICKETING WITH AN UNLAWFUL SECONDARY OBJECTIVE

A. Standard and Scope of Review

Generally, the Court's standard of review of orders of the Board is "highly deferential." *Trimm Associates, Inc. v. NLRB*, 351 F.3d 99, 102 (3d Cir. 2003). The Court must "accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence." *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002); *see* 29 U.S.C. § 160(e) & (f). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Horizon House, Inc. v. NLRB*, 57 Fed. Appx. 110, 115 (3d Cir. 2003) (No. 02-1199, No. 02-1547) (quoting *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 217 (1938)). If there is substantial evidence to support the Board's decision, the Court must not disturb that decision, even though it might "justifiably have made a different choice had the matter been before it *de novo*." *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The Board's conclusions of law are also entitled to "great deference." *NLRB v. Local 54, Hotel Employees & Restaurant Employees Int'l Union*, 887 F.2d 28, 30 (3d Cir. 1989). More specifically, such conclusions are entitled to respect, and must be upheld, if based upon a "reasonably defensible" construction of the Act. *Id.* (citing *NLRB v. United Food & Commercial Wkrs. Local 23*, 484 U.S. 112 (1987), and *Pattern Makers' League v. NLRB*, 473 U.S. 95, 100 (1985)); *see also Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

B. Applicable Section 8(b)(4)(ii)(B) Legal Principles

Section 8(b)(4)(ii)(B) of the Act makes it unlawful for a union "to threaten, coerce, or restrain" any other person where an object thereof is "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of" another person, "or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with" a union. 29 U.S.C. § 158(b)(4)(ii)(B). This language forms a portion of an overall legislative plan designed "with 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.” *NLRB v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 692 (1951).

Accordingly, the Board and the courts have determined that a union’s “deliberate entanglement of a neutral person in a dispute not his own . . . is violative of the secondary boycott provision of the Act.” *Local No. 441, Int’l Brotherhood of Elec. Wkrs.*, 222 NLRB 99, 101 (1976), *enfd. mem.* 569 F.2d 160 (D.C. Cir. 1977). The two prerequisites for the finding of a Section 8(b)(4)(ii)(B) violation are: 1) that a labor organization threaten, coerce or restrain any person; and 2) that an object of this conduct be to force one person to cease doing business with another person or any of the other unlawful objects listed in Section 8(b)(4)(ii)(B). *See, e.g., Sheet Metal Workers Local 27*, 321 NLRB 540, 547 (1996); *accord Limbach Co. v. Sheet Metal Workers*, 949 F.2d 1241, 1249-50 (3d Cir. 1991).

C. Jones’s threats directed against Chesnut Partners violated Section 8(b)(4)(ii)(B) of the Act

Substantial evidence supports the Board’s finding that Jones threatened Chesnut Partners with protests, work stoppages and other problems in violation of Section 8(b)(4)(ii)(B) of the Act. That Jones made these comments is undisputed; that these comments constituted a threat and demonstrated the Union’s unlawful secondary objective is clear.

Accordingly, the Board's Order with respect to this violation is entitled to enforcement.

Strine's undisputed testimony provides ample support for the Board's finding that Jones threatened Chesnut Partners. Jones identified himself to Strine as a representative of the Union and stated that he had a problem with Adams-Bickel and its hiring of "unfair contractors." (A 183-84.) Jones then threatened that "[i]f that's the way that it's going to go [that is, if Adams-Bickel is going to hire "unfair contractors"] the building is going to have a problem." (A 185.) Not stopping there, Jones explained that, by "problem," he meant "protests, work stoppages and problems with deliveries." (A 185.) When Strine asked Jones what he could do to avoid these problems, Jones told Strine that "we just want you to use some of your juice to convince Adams-Bickel to use fair contractors." (A 187.)

As this Court has found, vague warnings to neutrals about future "problems" are threats within the meaning of Section 8(b)(4)(ii)(B). Indeed, in *Metropolitan Regional Council of Philadelphia and Vicinity v. NLRB*, which involved the same Union involved here, the Court agreed with the Board that a Union agent's comment that "there could possibly be some problems in the future" was a "blatant threat." 50 Fed.Appx. at 89, 91. Moreover, even if Jones's initial comment alone was not enough to

constitute a threat, his additional comments made his threat explicit: first, he stated with certainty that the building “is going to have a problem” if Adams-Bickel continued to hire “unfair contractors;” second, he explained that, by problems, he meant “protests, work stoppages, and interruptions of deliveries.” As the Board properly found (A 10), these additional comments illuminated the threat implicit in Jones’s vaguer warning of a “problem.”

The record evidence also fully supports the Board’s finding that Jones’s threats and other comments demonstrated the Union’s unlawful secondary objective. It is apparent from Jones’s comments that his objective was to force Chesnut Partners to use its influence to get Adams-Bickel to cease doing business with “unfair contractors,” or, at the very least, to influence the condominium owners to cease doing business with Adams-Bickel. Indeed, Jones blatantly threatened that Chesnut Partner’s project at 421 Chesnut Street would have problems because Adams-Bickel was hiring unfair contractors; he then enlisted Chesnut Partners to exert its influence and convince Adams-Bickel not to use those “unfair contractors.” (A 183-87.) This is exactly the type of “deliberate entanglement of a neutral person in a dispute not his own” that Section 8(b)(4)(ii)(B) was enacted to prevent. *See Metropolitan Regional Council of Philadelphia & Vicinity v. NLRB*, 50

Fed. Appx. at 91 (holding that similar threats were indicative of the Union's unlawful motive).

In challenging the Board's finding of a violation, the Union makes three arguments: first, the Union claims that Jones's comments related to the possible conduct of other unions and not his own, second, the Union contends that constitutional and statutory "free speech" issues protect Jones's comments, and third, the Union asserts that the Board improperly relied on Jones's failure to testify. None of these arguments has merit.

Contrary to the Union's claims (Br 16-18), the Board reasonably found (A 10) that Jones's comments related to the conduct of the Union, not to the possible conduct of other unions. Jones identified himself to Strine as a representative of the Union and told Strine that Adams-Bickel was "my," that is, Jones's, problem because it was hiring "unfair contractors." (A 183-84.) Immediately thereafter, Jones threatened Strine that "[i]f that's the way that it's going to go the building is going to have a problem." (A 185.) At no point prior to making the threat did Jones identify any other union, much less suggest that he was only predicting conduct in which other trades might engage if something were not worked out with Adams-Bickel.

Jones's subsequent references to additional problems other trades might have with Adams-Bickel are insufficient to recast the meaning of his

earlier threat. When speaking about those other trades' issues with Adams-Bickel, Jones indicated that those issues "went beyond problems with the [Union]" (A 185.) Thus, even when discussing these additional issues, to which the Union ascribes so much weight, Jones cast them as something above and beyond the Union's problems with Adams-Bickel and the contractors it was hiring.³ Moreover, when discussing the other unions, Jones never mentioned the possibility that it was they who might boycott. Rather, he only mentioned their perceived inability to bid work, and his concern that those trades could create further issues for Jones to deal with in the future. (A 185.) Thus, Strine's testimony shows that Jones repeatedly distinguished the Union's problems with Adams-Bickel from the other trades' problems with Adams-Bickel. In short, the Union's argument that, when threatening Strine, Jones referred only to the possible conduct of other unions lacks any support in the record and can be easily rejected.

The Union's make-weight "free speech" argument (Br 17) is equally meritless. As this Court has noted, the United States Supreme Court has "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment" and

³ In light of these comments clearly indicating that the Union had its own problems with Adams-Bickel, the Union's assertion that it "had no reason" to threaten Chesnut Partners is entitled to little weight.

has indicated that “conduct designed not to communicate but to coerce merits still less consideration under the First Amendment.” *Metropolitan Regional Council of Philadelphia & Vicinity*, 50 Fed.Appx. at 91 (quoting *International Longshoremen’s Ass’n v. Allied Int’l*, 456 U.S. 212, 226-27 (1982)). The removal of “free speech” protection from coercive or threatening conduct is also embodied in Section 8(c), the Act’s First-Amendment cognate, which excludes “expression[s] contain[ing] [any] threat of reprisal or force” from its protection. 29 U.S.C. §158(c). Because the comments here were a coercive threat of force, they are entitled to no “free speech” protection.

Finally, the Union’s argument (Br 19-20) that the Board’s finding lacks record support, because the General Counsel failed to call Jones as a witness to corroborate Strine’s testimony, is nonsensical. First, as explained above, Strine’s testimony provided a sufficient basis for the Board’s finding of violation. Moreover, the notion that the General Counsel would then call Jones, to corroborate his own misconduct, defies logic. Rather, one would expect *the Union* to call Jones to rebut the General Counsel’s evidence. That the Union chose not to could only serve to bolster the General Counsel’s case, though, here, the judge chose not to draw such an adverse

inference. (A 7-8, n.12.) Yet even absent an adverse inference, no logical argument can be made that Jones's silence undermines the Board's finding.

The Union has voiced no arguments that could undermine the Board's findings and reasonable conclusions with the respect to the Chesnut Partners threat. Accordingly, the Court should uphold the Board's finding.

**D. Jones's threat directed against Penn Valley violated
Section 8(b)(4)(ii)(B) of the Act**

Ample evidence supports the Board's finding that Jones threatened a work stoppage at the Penn Valley jobsite, in violation of Section 8(b)(4)(ii)(B) of the Act. It is undisputed that Jones warned Penn Valley of a work stoppage; the Board's finding that those words constituted a threat is supported by substantial evidence. Likewise, Jones made explicit his unlawful objective when he urged Penn Valley to use its influence and require American Millwork to recognize the Union or to cease doing business with American Millwork. Accordingly, the Board's Order with respect to this violation is entitled to enforcement.

It is undisputed that Jones approached McCardle at the Penn Valley jobsite and told him that American Millwork was "jerking" Jones around and that, "if an agreement isn't worked out between American Millwork and the Union[,] the truck's not getting unloaded." (A 230-31.) Jones then immediately reiterated that his men would not "unload that truck if

something's not worked out between American Millwork and the Union.”

(A 231.) Jones then directed McCardle to call American Millwork and see if there was something he “could do about it.” (A 231.)

The Board reasonably determined that Jones's comments were a threat. Jones's comment indicated that his men would prevent the delivery of millwork to Penn Valley's project, effectively bringing the entire job to a standstill. Moreover, when Jones subsequently suggested that the only way the Union would not cause a work stoppage was if McCardle pressured American Millwork, the coerciveness of his comments became manifest. *See Operating Engineers Union 3*, 340 NLRB 1053, 1056 (2003); *Sheet Metal Workers Local 104 (Losli International)*, 297 NLRB 1078, 1083 (1990).

Contrary to the Union's claim (Br 22-24), there is no evidence that Jones was merely notifying McCardle about other possible picket activity and that Union-represented employees would honor a valid picket line. Jones did not mention to McCardle any other union that might picket the Penn Valley project, nor did he provide any purpose for possible picketing other than to enlist McCardle's aid in forcing American Millwork to recognize the Union. In these circumstances, the Board reasonably found (A 10-11) that Jones was referring to the Union, and that the strained

interpretation of McCardle's testimony offered by the Union in no way undermines that finding.

The evidence of the Union's unlawful secondary objective is equally clear. Indeed, in its brief (Br 24 n.18), the Union admits that "Jones was trying to put pressure on [Penn Valley] to get involved in the dispute and have [American Millwork] sign an agreement." As discussed above, the use of threats on neutral employers to bring about such an object is proscribed by Section 8(b)(4)(ii)(B).

Even without this concession, the circumstances leave little doubt as to the Union's unlawful objective. As the Board found (A 11), the context, including the Union's unsuccessful efforts to obtain recognition from American Millwork, make clear that one reason Jones was threatening the work stoppage was to enlist Penn Valley's assistance in the Union's efforts to cause American Millwork to recognize it. *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251, 1252-53 (2006). Moreover, his indication that Union-represented employees working for neutral employers would refuse to handle American Millwork's goods, and that McCardle could "do something about" that, also suggests that Jones sought to force Penn Valley and PA Fly to cease doing business with

American Millwork. *See Sheet Metal Workers Local 104 (Losli International)*, 297 NLRB 1078, 1083 (1990).

Based on the foregoing, there is ample evidence adequate to support the Board's reasonable conclusion that Jones's comments to McCardle were threats of unlawful secondary activity in violation of Section 8(b)(4)(ii)(B). Accordingly, the Board's findings and conclusions with respect to this violation should be upheld.

II. THE BOARD ACTED WITHIN ITS DISCRETION IN REMEDYING THESE VIOLATIONS AND IS ENTITLED TO ENFORCEMENT OF ITS ORDER IN FULL

A. Standard and Scope of Review

Section 10(c) of the Act “vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); accord *Quick v. NLRB*, 245 F.3d 231, 254 (3d Cir. 2001). This is so “because the relation of remedy to policy is peculiarly a matter for administrative competence.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Therefore, “courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.” *Id.*

In devising remedies, the Board “draws on a fund of knowledge and expertise all its own,” *Quick v. NLRB*, 245 F.3d at 254 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n.32 (1969)), and on its “enlightenment gained by experience.” *Id.* (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). Consequently, courts of appeals “should not substitute their judgment for that of the [Board] in determining how best to undo the effects of unfair labor practices.” *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 899). Thus, the Board’s “choice of remedy must be given ‘special respect by reviewing courts,’” “and must not be disturbed ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Quick v. NLRB*, 245 F.3d at 254 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. at 613, and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 216).

B. Applicable Remedial Principles

The Board’s statutory mandate expressly allows it to issue a remedial “order requiring such person [as committed the unfair labor practice] to cease and desist from the unfair labor practice” and to take other affirmative action to effectuate the policies of the Act. 29 U.S.C. § 160(c). The breadth of a remedial order “must depend upon the circumstances of each case.”

NLRB v. Express Pbl'g Co., 312 U.S. 426, 436 (1941). A Board order that enjoins violations other than those found by the Board is permissible and within the Board's discretion when it appears that the enjoined violations "bear some resemblance to that which the [party] has committed or that danger of their commission in the future is to be anticipated from the course of [its] conduct in the past." *Id.* at 437.

Applying these principles, the Board developed a test for gauging the appropriateness of any request for such an order. The Board has determined that broad orders are warranted where "a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for...fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). It explained that "repeat offenders and egregious violators" will be subject to imposition of broad cease-and-desist orders. *Id.* Recently, the Board explained that a broad order under *Hickmott Foods* is appropriate where "the totality of the circumstances" provide "an objective basis for enjoining a reasonably anticipated future threat." *Five Star Mfg., Inc.*, 348 NLRB No. 94, slip op. at 1 (2006).

Such orders constitute an appropriate means of protecting "other employees [and employers] . . . exposed to the same type of pressure

through other comparable channels.” *Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, 705-06 (1951). Courts have upheld such broad remedial orders. *See, e.g. NLRB v. International Broth. of Elec. Workers*, 251 Fed.Appx. 101 (3d Cir. 2007) (No. 06-4124); *United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006); *Federated Logistics & Operations v. NLRB*, 400 F.3d 920 (D.C. Cir. 2005); *NLRB v. G & T Terminal Packing Co., Inc.*, 246 F.3d 103 (2d Cir. 2001); *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 624 (2d Cir. 1994); *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 126 n.4 (4th Cir. 1993); *Coil-A.C.C., Inc. v. NLRB*, 712 F.2d 1074, 1076 (6th Cir. 1983).

C. The Board’s Broad Order is Entitled to Enforcement Because the Union has Demonstrated Both its Proclivity to Violate Section 8(b)(4)(ii)(B) and its Fundamental Disregard for the Rights of Neutral Employers

1. The Board’s Order Was Within its Broad Remedial Discretion

There can be little doubt that the Board is entitled to a cease-and-desist order that broadly enjoins the Union from violating Section 8(b)(4)(ii)(B) of the Act. As the Board reasonably found (A 14-15), the Union has demonstrated a proclivity to violate Section 8(b)(4)(ii)(B), a general disregard for the rights of neutral employers, and a blatant disrespect for the Board and its processes. In these circumstances, a broad cease-and-desist order is necessary to close all of the possible avenues for application

of secondary pressure against neutral parties that this Union might target *en route* to the achievement of its unlawful objectives.

As an initial matter, although the Board's Order is broad in that it extends beyond the specific unfair labor practices considered in this case, it is tailored to fit the needs of the case. Therefore, unlike some broad orders that enjoin an entity from violating *the Act* "in any other manner," the Order here enjoins the Union from "in any other manner engag[ing] in conduct prohibited by Section 8(b)(4)(ii)(B) of the Act that is directed at neutral employers with" any of the unlawful objectives listed in that section of the Act. (A 15.) While this order broadens the types of misconduct enjoined and the scope of coverage to include all potential secondary parties, it enjoins only that conduct which bears "some resemblance to that which the [Union] has committed" or that may "be anticipated from the course of [the Union's] conduct in the past." *NLRB v. Express Pbl'g Co.*, 312 U.S. at 436.

As the Board explained (A 12-14), the Union has engaged in extensive unlawful secondary activity demonstrating its proclivity to violate Section 8(b)(4)(ii)(B) and its disregard for the rights of neutral employers. Indeed, as we showed above (pp. 3-8), prior to the unlawful threats found in this case, the Union violated Section 8(b)(4)(ii)(B) on 9 separate occasions, affecting approximately 25 different employers, both primary and

secondary, in the Philadelphia area. (A 14.) Moreover, the Union has not limited its Section 8(b)(4)(ii)(B) conduct to a single type of unlawful secondary activity; on the contrary, it has engaged in a wide range of unlawful actions, including threats, picketing, excessive sound amplification, and coercive demonstrations, directed against neutral employers in furtherance of the Union's unlawful objectives. (A 12-13.) And, as demonstrated by its conduct here, the Union continues to engage in these unlawful activities. The Union's threats here bear an uncanny resemblance to its repeated and continued attacks on neutral employers, and amply demonstrate that it is a Section 8(b)(4)(ii)(B) "repeat offender."

In issuing a broad cease-and-desist order, the Board also noted that the Union has repeatedly targeted one of the charging parties in this case, Adams-Bickel. (A 14.) The Board noted two prior incidents where the Union sought to coerce Adams-Bickel in violation of Section 8(b)(4)(ii)(B). (A 14.) Coupled with the Union's unlawful threat involving Adams-Bickel here, the Board determined that "this pattern of misconduct . . . demonstrat[ed] a proclivity to violate the Act within the meaning of *Hickmott Foods*." (A 14, citing *Painters Local 558 (Carroll Day Glass)*, 317 NLRB 254 (1995)). The near-ubiquity of Adams-Bickel in the Union's

campaign of unlawful secondary activity makes clear the resemblance of its present conduct from its previous unlawful activities.

Finally, the Board relied on the ineffectiveness of prior narrow cease-and-desist orders to curtail the Union's unlawful conduct. The Board noted that, even though previous narrow orders have been enforced by judgments of this Court, they have not proven effective in protecting the rights of neutral employers. (A 14-15.) As the Board found, the Union's utter disregard for the narrow cease-and-desist orders that this Court has enforced demonstrates its contempt for the rights of neutral employers and its disrespect for the processes of the Board and of this Court. This disrespect highlights the danger that future violations may be anticipated from the Union's prior course of conduct.

Accordingly, the Union's multiple and varied violations of Section 8(b)(4)(ii)(B) against different employers virtually guarantee that, unless broadly enjoined, it will find other ways to unlawfully entangle neutral persons in disputes not their own. Thus, the broad cease-and-desist order should be enforced. *NLRB v. International Broth. of Elec. Workers*, 251 Fed.Appx. 101 (3d Cir. 2007) (No. 06-4124) (enforcing, without discussing, broad cease-and-desist order); *United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006); *Cf. NLRB v. Building &*

Const. Trades Council of Delaware, 578 F.2d 55 (3d Cir. 1978) (denying broad order against union because there was no evidence of similar violations with respect to other employers and because earlier violations bore no resemblance to violation under consideration).

2. The Union's Arguments Against the Broad Order Are Without Merit

The Union offers two arguments against imposition of a broad cease-and-desist order. First, it contends that certain of its unlawful activities were “cutting edge,” which characterization, it asserts, somehow undoes the coercive nature of those activities. Second, it claims that a broad order is not appropriate because the conduct relied upon occurred over a prolonged period. Neither argument has merit.

The Union does not deny that it has repeatedly violated Section 8(b)(4)(ii)(B) by engaging in unlawful secondary activity. Indeed, in its brief, it admits to six separate violations, including unlawful threats and unlawful picketing, between January 2001 and January 2006. (Br. 29.) It merely argues that certain of its tactics, for example, its use of excessively loud speakers and coercive, though non-traditional, demonstrating, are “cutting edge” tactics the lawfulness of which depends “upon the specific circumstances.” (Br. 28.) In making this argument, the Union highlights the need for a broad order. In addition to its admitted recent history of

traditional Section 8(b)(4)(ii)(B) violations, like threats and picketing, the Union has demonstrated a proclivity to employ other, often novel, coercive tactics in furtherance of its unlawful secondary objectives. As the Supreme Court said in approving the Board's issuance of another broad order, "[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *Electrical Workers v. NLRB*, 341 U.S. 694, 706 (1951). A broad order is necessary here to close all roads the Union might take *en route* to its unlawful secondary objectives.

Similarly, the Union's attempt to characterize as protracted the period of time in which these violations occurred must fail. (Br. 29.) While approximately 7 years passed between the first and last instances of unlawful conduct, the record demonstrates that the Union's misconduct has been consistent over time and concentrated in recent years. The Union's past violations demonstrate a long-standing and relentless campaign of unlawful secondary activity targeting neutral employers. Further, as the Board noted, the temporal relationship between the Union's prior history of misconduct and the events of the current case demonstrates the need for a broad order. The Chesnut Partners threat occurred shortly after the secondary picketing at Kimball Street, and while a complaint about that activity was pending. The

Penn Valley threat occurred just weeks after this Court enforced two Board orders enjoining the Union from engaging in these types of activities.

Moreover, as the Board found, all of the Union's prior actions have had a profound impact on the rights of neutral employers and the regional economy. (A 14.)

In short, the Union has failed to show that the Board abused its broad remedial discretion in issuing the broad order. Thus, the Court should enforce the Board's Order in full.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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April 14, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

METROPOLITAN REGIONAL COUNCIL OF
CARPENTERS, SOUTHEASTERN PENNSYLVANIA,
STATE OF DELAWARE AND EASTERN SHORE OF
MARYLAND, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA

Respondent

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* Case No. 07-4679
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* Board No.
* 04-CC-2463
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COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 7,376 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the PDF file containing a copy of the Board's brief that was sent by e-mail to the Court are identical to the hard copy of the Board's brief filed with the Court and served on counsel. The PDF file was

scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (4/09/2008 rev. 9), and according to that program, are free of viruses.

CERTIFICATION OF BAR MEMBERSHIP

Board counsel certifies that at least one of the attorneys whose names appear on the brief is a member of the bar of this court, or has filed an application for admission pursuant to 3rd Cir. LAR 46.1.

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Dated at Washington, D.C.
this 14th day of April, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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