Obama Board Expands Unions' Right To Engage In Secondary Boycotts: Stationary "Bannering" Held Not Equivalent To Picketing And Deemed To Be Lawful

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In its first major ruling since being reconstituted by President Obama, the Democrat-controlled National Labor Relations Board (NLRB) has rejected the position of the NLRB's General Counsel and has determined that stationary bannering does not violate Section 8(b)(4)(B) of the National Labor Relations Act (NLRA). *United Brotherhood of Carpenters Local Union No. 1506,* 355 NLRB No. 159 (2010). This decision gives labor unions a powerful weapon: the ability to pressure a secondary (neutral) employer and its customers, in order to gain leverage over the primary employer with whom the union actually has its dispute. The facts in *United Brotherhood* illustrate the point below.

The Carpenters Union had primary labor disputes with four construction contractors in Arizona, claiming that the contractors failed to pay wages and benefits in accord with "area standards." In furtherance of its primary disputes, the Union protested at two hospitals and a restaurant, secondary employers with whom the Union had no primary dispute. The four construction contractors had engaged in construction work at the sites of the secondary employers.

Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a union to "threaten, coerce, or restrain" a secondary employer where an object is to cause the secondary employer to cease doing business with the primary employer. At issue in *United Brotherhood* was whether the Union's conduct in "bannering" was the equivalent of picketing, which would have been clearly unlawful, or more like non-coercive peaceful "handbilling," which clearly would have been lawful.

At each of the secondary employers' locations the Union displayed a large stationary banner, either stating "Shame On _____," naming the hospital, or "Don't Eat At _____," naming the restaurant. The banners were three or four feet high and from 15 to 20 feet long. The banners were held in place at each location by two or three Union representatives. The banners were placed anywhere from 15 to 1,050 feet from the nearest entry to the secondaries' establishments. The Union representatives also offered flyers to anyone who would take them, explaining therein that the Union's underlying complaint was with the construction contractors, and that by using these contractors, the hospital or restaurant was contributing to the undermining of area wage standards.

At noted above, the NLRB's General Counsel (as well as the Charging Parties) argued that bannering was the equivalent of picketing, that "picketing exists where a union posts individuals at or near the entrance to a place of business for the purpose of influencing customers, suppliers, and employees to support the union's position in a labor dispute." But a majority of the NLRB disagreed (the two Republican appointees dissenting), finding that bannering was not picketing or its equivalent, because there was no "confrontational" conduct, such as patrolling back and forth in front of the entrance while carrying placards. Absent confrontational conduct, the majority concluded, bannering was more like peaceful handbilling, an exercise in "free speech," and therefore did not "threaten, coerce, or restrain" the secondary employers as would picketing.

There was a vigorous dissent by the minority members of the NLRB, who concluded there was no meaningful distinction between bannering and picketing. All parties would have agreed that a single picketer patrolling back and forth with a sign saying "Don't Eat Here Because This Restaurant Was Built With Non-Union Labor" would be engaged in unlawful secondary boycott picketing. Yet the NLRB's majority would find that three union protesters holding a much larger banner saying the same thing would not be engaged in unlawful conduct because the bannering allegedly does not rise to the level of confrontational conduct!

It will be interesting to see how this decision may be viewed by the reviewing federal Courts of Appeal. In any event, it provides a dramatic example of how the present Obama Board may construe the NLRA in an effort to expand the weaponry and capabilities of organized labor.