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Union "Shame" Banners Not Confrontational Enough for the NLRB

In one of the first precedent-setting decisions by the newly pro-union majority of the National Labor Relations Board ("NLRB"), the NLRB has held that it is permissible for a union to protest against neutral building owners' and tenants' use of non-union contractors by displaying large stationary "shame on" banners at the neutral businesses' facilities. Though it would be unlawful for a union to engage in picketing against a neutral or "secondary" employer in such circumstances, the NLRB's new decision in *Carpenters Local 1506 and Eliason & Knuth of Arizona, Inc. et al.* (Aug. 27, 2010), found that stationary banners were not "confrontational" enough to constitute picketing and did not "threaten, coerce, or restrain" such businesses in violation of the National Labor Relations Act.

The NLRB's decision was long anticipated by observers in the construction industry. The Carpenters Union ("Union") has engaged in its bannering tactics in many urban areas of the country for more than a decade. Numerous challenges to such bannering had been filed during that time, with considerable evidence of the coercive impact of such banners on neutral employers in apparent violation of laws prohibiting secondary boycotts by unions against neutral customers. But the NLRB was unable or unwilling to address the issue during the Bush Administration, and President Obama's new appointments clearly signaled a shift in favor of the union position on bannering.

Each of the newly decided cases, which had been pending at the NLRB for nearly a decade, involved a primary dispute over wages and benefits between four non-union construction employers in Arizona (the "primary" employers) and the Union. In each case, the Union displayed a stationary banner - 3 to 4 feet high and from 15 to 20 feet long - at the premises of three secondary (neutral) employers, two medical centers and a restaurant, that engaged the construction employers for certain projects. None of the secondary employers had collective-bargaining relationships with the Union, and the Union was not seeking to organize their employees.

Nevertheless, at the three different locations, the Union placed a banner on a public sidewalk or public right-of-way outside of the secondary employers' facilities. Two of the banners read: "SHAME ON [SECONDARY EMPLOYER]" followed by the phrase "Labor Dispute" in small letters, and the other banner discouraged the public from eating sushi prepared by the neutral restaurant employer. The Union representatives did not engage in chanting, yelling, marching, or any similar conduct. The banners were located on public property at varying distances - between 15 and 1,050 feet - from the entranceway to the neutral employers' premises.

The neutral employers filed unfair labor practice charges against the Union under Section 8(b)(4)(ii)(B) of the Act which makes it illegal for a union or its agents:

- "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where...an object thereof is..."
- "forcing or requiring any person to...cease doing business with any other person...."

Applying Section 8(b)(4)(ii)(B) to the Arizona cases, the NLRB majority, including two former union attorneys appointed by President Obama, ruled that the Union's stationary banners lacked the "confrontational aspect" necessary for a finding of picketing proscribed as "coercion or restraint" within the meaning of the Act. Moreover, the NLRB rejected its own General Counsel's broad definition of "signal picketing," which has long been prohibited by the NLRB under similar circumstances.

The *Carpenters Local 1506 and Elison & Knuth of Arizona, Inc.* decision contains a lengthy dissent, in which Members Peter C. Schaumber and Brian E. Hayes contend that their fellow members have created a "startling new standard that exempts other types of secondary activity from the Act's reach unless it causes or can be expected to cause some unknown quantum of 'disruption of the secondary's operation.'" The dissenters predicted that the new standard will result in a dramatic increase in secondary boycott activity.

It remains to be seen whether the NLRB's new decision will be enforced by the courts or reversed on appeal. It is significant that the NLRB based its holding on findings that the Union activity confined itself to bannering alone, without the presence of any picketing, noisemaking, defamation, or other confrontational tactics. As least one court has held that a union's total course of conduct, including bannering along with other secondary pressure tactics, may be found to violate the secondary boycott

laws. Non-union contractors and their neutral customers, therefore, may have the right to injunctive relief or to recover damages for lost business resulting in part from bannering against neutrals. Nevertheless, unless and until the NLRB's new decision is overturned or limited by subsequent decisions, the new policy will likely lead to increased disruptions of neutral businesses in exactly the manner that the secondary boycott laws were designed to protect against.

Venable attorneys have long been at the forefront of efforts to protect the rights of all contractors and their customers to perform work on the basis of merit, protected by law from unlawful threats and pressure tactics by union agents. Those efforts will continue, and options remain available despite the new NLRB decision. Questions regarding the rights of contractors and customers under the new decision should be addressed to the authors.

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