A Timely Analysis of Legal Developments

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The NLRB's recent decision condoning union bannering at a secondary employer worksite may result in an increase in such boycott activity directed at neutral employers.

A Banner Day for Union Boycotts

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On August 27, the National Labor Relations Board issued a decision in a trio of unfair labor practice cases involving the question of whether a union may lawfully display large, stationary banners publicizing a labor dispute outside the premises of a *neutral* or *secondary* employer – one with which the union has no dispute. In *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506,* 355 NLRB No. 159 (2010), the Board, by a 3-2 margin, held that, so long as it is done in a non-coercive manner, a union may display such banners without running afoul of the prohibition against secondary boycotts contained in the National Labor Relations Act ("Act"). The Board's long-awaited decision promises to result in more bannering activity and to ensnare more neutral employers in labor disputes not of their own making.

In a secondary boycott, a union typically appeals to the customers of a neutral employer in the hope that the neutral employer will, in turn, put pressure on the primary employer, the entity with which the union actually has a dispute, to give in to the union. Section 8(b)(4)(ii)(B) of the Act, part of the secondary boycott provisions, makes it an unfair labor practice for a union to *coerce* or *restrain* neutral employers for this purpose. Under that section, *picketing* directed at a neutral employer violates the Act because of the inherently coercive, intimidating nature of picketing, which often includes patrolling back and forth in front of a worksite entrance. In contrast, cases interpreting the Act have carved out an exception to the secondary boycott provisions for *handbilling*, which has been recognized more as a form of peaceful persuasion and not coercion. The key question for the Board in the *Carpenters* cases was whether the display of stationary banners on public sidewalks or rights of way was more akin to the intimidation that accompanies picketing, or the mere persuasion that is the essence of handbilling.

The unfair labor practice charges in the *Carpenters* cases stemmed from a campaign by the United Brotherhood of Carpenters against several nonunion construction

contractors. The union maintained that the contractors were paying substandard wages and benefits. As part of its campaign, the union erected large stationary banners outside businesses that retained the contractors, including two medical centers and a restaurant. Outside the medical centers, the banners said: "SHAME ON [SECONDARY EMPLOYER]." Outside the restaurant, the banner discouraged the public from patronizing the restaurant by urging "DON'T EAT [SECONDARY EMPLOYER] SUSHI." The content of the banners was clearly directed at the neutral employers themselves, not the targeted contractors. In each case, the message on the banner was flanked with the words "Labor Dispute." Between two and four representatives of the union held the banners on a public sidewalk or right-of-way in a manner that did not block the flow of traffic. While holding the banners, the union representatives offered handbills to passers-by, explaining that the labor dispute was with the primary employer (*i.e.*, the contractors) and that the union believed that the neutral employers' business dealings with the contractors contributed to undermining area wage and benefit standards. The union representatives did not chant, yell, march, or engage in any conduct that the Board considered confrontational.

On these facts, the Board found that the union's actions "lacked the confrontational aspect necessary to a finding of picketing proscribed as coercion or restraint. . . ." In arriving at that finding, the Board noted that the "banner holders did not move, shout, impede access, or otherwise interfere with the secondary's operations." It added that, in the absence of any actual or symbolic barrier to entering the secondary employer's site, the banners could simply be ignored by employees or members of the public in much the same way as a billboard could be ignored – by simply averting their eyes. In these circumstances, the union's conduct, as the Board interpreted it, was more akin to the persuasion of handbilling than the intimidation of picketing. The Board therefore found the conduct to be non-coercive in nature, and held that, as such, the union did not violate the Act's prohibition against secondary boycotts by positioning the banners outside the premises of the neutral employers.

The *Carpenters* decision is significant because it is likely to spur more frequent secondary boycott activity by unions involving the use of banners. Under the Board's rationale, bannering would not necessarily have to be limited to the location at which the primary employer is working, or to the precise period of time during which the primary and secondary employers relationship existed. As a result, employers who have been picketed (at their place of business or elsewhere), exposed to handbilling, or otherwise targeted by a union, should develop a protocol for responding to bannering. Key considerations include:

- Employers who are about to undertake a capital project – such as a leasehold improvement – or start a new business relationship should ask subcontractors/prospective business partners if they are presently involved in a labor dispute, as evidenced by unfair labor practice charges, area standards or other picketing or litigation. If the answer is yes, they should consider adding to any commercial agreement a termination clause under which the agreement can be voided if an ensuing labor dispute creates a disruption to the secondary employer's business.
- By the same token, employers should be up front with business partners and customers who ask about their union issues so as to avoid claims that they intentionally concealed a problem, and that their problem subsequently became their customer's or business partner's problem.
- Employers, whether primary or secondary in a labor dispute, should understand the difference between bannering and handbilling on the one hand, and unlawful secondary picketing on the other hand. While the conduct of the union representatives in the *Carpenters* cases was not found to be coercive, evidence that the union representatives who were holding a stationary banner were also engaged in confrontations, threats or other forms of intimidating conduct would remove the bannering from the realm of peaceful expression and render it unlawful picketing.
- Establish a protocol to minimize disruptions at your place of business or at customer sites, including the development of a reserved gate system to isolate any picketing that may develop, as well as a system to monitor and, if necessary, record unlawful conduct of union representatives. Understand where property lines are and where bannering would be permissible/impermissible.

- If you think your business (or your customer's) is particularly vulnerable to a union banner, prepare draft unfair labor practice charges and civil litigation pleadings to ensure a swift response in the event that bannering crosses the line into picketing.
- Educate management personnel as to your rights and obligations under the Act to avoid their taking any actions that could result in the filing of unfair labor practice charges by the union. At the same time, recognize that neutral employers have standing to sue and file charges for conduct that violates the Act's proscription against unlawful secondary activity.
- Thwart a union's ability to truthfully engage in area standards picketing by knowing the wage and benefits package of union-represented employees in the area, as well as how to respond to a union's request for your wage and benefit data in advance of area standards picketing.
- If your business is the target of a union banner, work with legal counsel to develop a prepared statement in the event of press and public inquiries. Some employers have gone as far as creating their own banners to counter the union's efforts.
- As you enter new markets, develop an understanding of which unions are most likely to deploy banners and assess your exposure to disputes with them.

Given the Board's holding in the *Carpenters* cases, employers can expect to see an increase in the use of stationary banners by unions as a means to pressure neutral employers to fight their battles for (or at least with) them. An employer's ability to minimize potential disruptions to its customers and business partners from bannering will depend on how educated the employer is about its rights and how prepared it is to defend itself to the maximum extent allowed under the law.

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