

## NLRB Expands the Tools Available for Unions to Target Neutral Employers

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In a case of first impression, the National Labor Relations Board (NLRB or the Board), now operating under a Democratic majority, issued a controversial decision on August 27 that expands the labor movement's ability to wage public campaigns against "neutral" or "secondary" employers in addition to the "primary" employers that are the source of the labor dispute. *United Bhd. of Carpenters*, 355 N.L.R.B. No. 159 (2010). While federal labor law generally has insulated a neutral employer from being dragged into labor disputes at businesses that supply products or services to the neutral employer, in *Carpenters*, the Board upheld a union's right to display *large stationary banners* with messages attacking secondary employers that purchase products or services from the "primary employers" with whom the union has a labor dispute.

The factual background of *Carpenters* involved a construction union that had a primary dispute with nonunion contractors that allegedly offered substandard wages and benefits. Three businesses in Arizona, including two medical centers and a restaurant, utilized the services of the nonunion contractors, and the union targeted these three businesses with large, 16-foot banners reading "SHAME ON [secondary employer]" based on their business relationships. In response to the bannering activity, the neutral employers filed unfair labor practice charges against the union.

The union's bannering campaign implicated the National Labor Relations Act's prohibition on "secondary boycotts" under National Labor Relations Act Section 8(b)(4)(ii)(B). Such boycotts are statutorily defined as when a labor organization engages in conduct to "threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . forcing or requiring any person to . . . cease doing business with any other person." The provision was added to federal labor law with the objective of "shield[ing] unoffending employers" (the secondary or neutral employer) from improper pressure intended to induce them to stop doing business with another employer with which a union has a real dispute (the primary employer).

For years, this provision has prevented unions from engaging in *picketing* activity, like marching and carrying signs, that targets the secondary employer, while at the same time allowing unions to engage in peaceful *handbilling* in an effort to persuade the public not to patronize the secondary employer due to its relationship with the primary employer.

The *Carpenters* Board held that *stationary bannering* activity, even if the banners used were large in size and targeted the secondary employer, was protected activity akin to lawful handbilling rather than unlawful picketing. Relying on its interpretation of the statutory text, legislative history, and relevant case law, the Board majority ruled that that "[t]he banner displays here did not constitute such proscribed picketing because they did not create a confrontation. Banners are not picketing signs . . . [and] [t]he

banner holders did not move, shout, impede access [to], or otherwise interfere with the secondary's operations.”

The two dissenting Board members issued a strong dissent, arguing that “the majority puts [the] neutral party right back into the fray” by allowing unions to target secondary employers with large stationary banners near their businesses. The dissent noted that if the union had simply *moved* the banner back and forth, rather than keeping it stationary, legal precedent would label the activity unlawful secondary picketing.

This case is one of many pending before the reconfigured NLRB. Although the labor movement has failed to secure legislative reform under the Obama administration, such as by the passage of the Employee Free Choice Act, the NLRB will through the end of 2011 decide cases that have the potential to tilt the balance of labor law in favor of the labor movement.

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