

***The NLRB's Treatment of
Secondary Picketing, Handbilling,
and Bannering Affecting the
Construction Industry
— A Section 8(b)(4)(B) Primer —***

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John W. Prager, Jr., Esq.
General Counsel
Lusardi Construction Company
1570 Linda Vista Drive
San Marcos, CA 92078
760-744-3133

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I **Introduction**

Certainly one of the most difficult sections of the NLRA to comprehend and apply is Section 8(b)(4)(B), commonly-called the “section prohibiting secondary boycotts.” But in the 63 years since its adoption, the National Labor Relations Board (“the Board”) and the Courts have illuminated its language, defined its parameters, rounded its sharp edges, narrowed its seeming application to certain conduct, and at the same time applied it broadly to surprising circumstances, all the while carefully balancing it with the Free Speech and Press provisions of the First Amendment to the U.S. Constitution.

This paper seeks only briefly to scan the landscape created by the Board under Section 8(b)(4)(B) concerning the three types of labor organization activity commonly seen by the construction contractor—secondary picketing, handbilling, and bannering activity. As will be seen, Section 8(b)(4)(B) prohibits only some, and clearly not all, forms of union conduct directed toward neutral persons and businesses and thought by them to be “coercive.”

II **The Adoption of Section 8(b)(4)(B)**

Congress’ 1935 adoption of the Wagner Act – now known as the National Labor Relations Act (“Act”) – created a series of prohibitions of employer conduct, called unfair labor practices, and a procedure giving employees a right to choose a labor organization as their bargaining spokesperson. The Act also obligated employers to bargain collectively with that spokesperson. Significantly, the Wagner Act did not contain provisions to curb union coercive activity and abuses directed at employees or employers. Congress, did do so, however, twelve years after the passage of the Wagner Act.

The Taft-Hartley Amendments to the NLRA enacted in 1947 added, among other provisions, sections dealing with union tactics thought to be unfair concerning activities directed toward employees and employers, around which concern had arisen in the twelve years since the passage of the Wagner Act. Among those provisions was a new Section 8(b)(4), which restrains the union from engaging in certain activity directed

toward employers who were thought to be neutral in a union's primary labor dispute, and Section 8(b)(4) subsection (A).¹

The text of the new section proscribed, *inter alia*, "inducements" of employees to engage in a strike or a concerted refusal to work or perform services when such were for the object of, among other things, forcing an employer to cease doing business with another person or employer. The Section, however, was not construed so as to limit "primary" picketing or the effects of primary picketing on secondary employers. See, United Electrical Workers Local 813 (Ryan Construction Corp.), 85 NLRB 417 (1949).²

During the next twelve years, it became obvious that the section did not restrain all forms of the secondary boycott, i.e., certain "loopholes" developed in the prohibition of the Section and the reach of it. For example, only "inducements" to engage in "concerted" refusals were prohibited,³ and there was no prohibition against coercive conduct directed toward the secondary employer itself.⁴

Congress sought to close those loopholes in 1959.⁵ The Landrum-Griffin Amendments added by Congress in 1959, then, have presented the regulated public – unions, employees, and employers – with a new section, incorporating parts of the 1947 text, and adding further language to define what we now say is the prohibited secondary boycott.

Congress left us, however, with no bright line in the text of Section 8(b)(4)(B) as to the true distinction between "primary" and "secondary" activity. The section is verbose, with words that circumscribe activity, but confuse practitioners and courts alike.

¹ Neither the text of the Taft-Hartley Amendments to the Act, nor the text of the subsequently enacted Landrum-Griffin Amendments to the Act in 1959, use the term "secondary boycott" in describing what Section 8(b)(4) was designed to reach. But Senator Taft remarked about the intent behind this provision: "...This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and its employees...." (See, 2 L.M.R.A. Leg. Hist., p 1106).

² In Ryan Construction, *supra*, the Board indicated that where the primary picketing activity occurs on the premises of the primary employer, the effects of that activity on a secondary employer – a construction contractor seeking to perform activity at the primary's plant and entering into the compound through a gate for its use at which the union stationed its pickets – were *not* prohibited by then Section 8(b)(4)(A). The Board subsequently overruled its Ryan Construction decision. Local 36, Int'l Chemical Workers, (Virginia-Carolina Chemical Corp.), 126 NLRB 905 (1960).

³ NLRB v. Int'l Rice Milling Co., Inc., 341 U.S. 665 (1951).

⁴ Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952)

⁵ The U.S. Supreme Court has indicated that one of the purposes of the 1959 Amendment to Section 8(b)(4) was to close the loopholes which had been noted by the Board and the Courts. NLRB v. Servette, Inc., 377 U.S. 46 (1964).

III
The Text of Section 8(b)(4)(B) and its Publicity Proviso

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(b) It shall be an unfair labor practice for a labor organization or its agents –

- (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or
(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, [t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

.....*Provided further*, [t]hat for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

IV The Section 8(b)(4)(B) Conduct and Object

Before the 1959 Amendments to Section 8(b)(4), the Supreme Court had looked at the reach of the 1947 version of the prohibitions in Section 8(b)(4)(A), and described the language as prohibiting “a union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party.” Carpenters, Local 1976 v. NLRB (Sand Door & Plywood), 357 U.S. 93, 98 (1958).

As the text was thereafter arranged by the 1959 Congress, the section retained its general format— Section 8(b)(4)(i)and(ii)(B) reaches union specified *CONDUCT* engaged in for a proscribed *OBJECT*.

There are two basic types of *CONDUCT* within the possible reach of the prohibition in Section 8(b)(4)(B):

- 1) “Inducements” of employees employed by an employer to refuse to perform services;⁶ and
- 2) “Threats, restraints or coercion” of an employer.⁷

There are two basic types of *OBJECTS* for which the above conduct is proscribed:

- 1) Forcing or requiring one person to use the services or products of another, or to cease doing business with another;⁸ or
- 2) Forcing or requiring another employer to recognize or bargain with a labor organization, unless that labor organization is the certified bargaining representative.⁹

Subsection (B) contains a self-imposed limit, in that it does not render unlawful the primary strike or primary picketing. But it does not specifically indicate under what circumstances the intended limitation is to function, especially where the separate employers – i.e., the primary employer and the secondary employer – may be working

⁶ “The words ‘induce or encourage’ are broad enough to include in them every form of influence and persuasion....” Electrical Workers, Local 701 (Samuel Langer) v. NLRB, 341 U.S.694, 701 (1951).

⁷ NLRB v. Servette, Inc., 377 U.S. 46 (1964) (non-coercive appeals to exercise managerial discretion do not constitute illegal “coercion”).

⁸ NLRB v. Operating Engrs, Local 825 (Burns & Roe), 400 U.S. 297 (1971) (the cessation of business sought need not be total).

⁹ If the union uses proscribed conduct against a neutral employer to further its “recognitional” or “bargaining” object with a primary employer, it does not violate Section 8(b)(4)(B) if it does so and is the Board certified representative of the employees of the primary. In other words, the neutral employer may in fact be embroiled in the union’s dispute with the primary employer, a result difficult to understand given the Congressional policies behind the Section. See, UFCW, Local 1996 (Visiting Nurse Health System, Inc.), 336 NLRB No. 35 (2001).

side-by-side on a common-situs, such as a construction project, but are commonly dependent upon each other at the site.¹⁰

V

The Moore Dry Dock Criteria and Secondary Construction Site Picketing

Early on in the development of its secondary-boycott jurisprudence, the Board was called upon to balance the right of a union to picket a primary employer and the right of a secondary employer to be free of union picketing at the secondary employer's premises when the primary is also present. The Board did so in Sailor's Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950). There, the Board recognized the ambulatory nature of the primary situs in many situations, i.e., the transient location of the primary employer with whom the union had a dispute. The Board announced a new test to carefully ensure that the picketing would be "primary" even though at the "secondary" situs, so that neutral employees and employer(s) at the common-situs would not be unfairly enmeshed in the union's primary dispute:

"[T]he picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer..." *Id.*, at 548-549.

When the Supreme Court considered a subsequent case, Local 761, Electrical Workers v. NLRB (General Electric), 366 U.S. 667 (1961) where the Board attempted to apply the Moore Dry Dock criteria to a picketing situation where separate gates had been set aside for the use of the allegedly "neutral" secondary employers at the General Electric plant, it approved the use of those criteria, but stated that the Board was permitted to do so only if the following factors are present:

"There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant was engaged in its regular operations, necessitate curtailing those operations."¹¹

¹⁰ NLRB v. Denver Bldg & Const Trades Council, 341 U.S.675 (1951) (construction prime contractor and subcontractors are separate entities and persons even though performing integrated functions and dependent upon each other on a construction site).

¹¹ *Id.* at 681

Where these factors are present, the Moore Dry Dock criteria are applicable, and the picketing may not take place at the gate being used by the employees of the neutral employer. This result applies especially to new construction work engaged in by construction firms.¹²

The General Electric and Moore Dry Dock criteria have led to the general application and use of the “reserved gate” system on construction projects, a system with which many practitioners are familiar.

To have such a system at the construction site requires, at a minimum, adequately worded signs demarcating the entrance/exit to the site for the primary employer, its employees, and its suppliers, so that the union is not misled as to the situs of the dispute. See, Plumbers, Local Union 398 (Robbins Plumbing & Heating), 261 NLRB 483 (1982).

In selecting the location of the gate reserved for the primary employer, the employer needs to ensure that its chosen location will not impair the ability of the union to deliver its message to those legitimately within its reach. Local 453, IBEW (Southern Sun Electric), 237 NLRB 829 (1978). But, the mere fact that the primary gate is less accessible to the primary than the neutral gate is to the neutrals does not affect the efficacy of the system. IBEW, Local 903 (Hinton Commercial Contractors), 230 NLRB 1017, 1019-1020 (1977).

In establishing the gate system, it should be remembered that service entities contracted to provide general services (e.g. lunch truck, toilet service supplier) at the site to all employers there are not bound by the gate system, since they are not “considered” suppliers of either the primary or neutrals. Ironworkers, Local 433 (Chris Crane), 294 NLRB 182, 183 (1989); Int’l Union of Operating Engrs (McDevitt & Street), 286 NLRB 1206 (1987); Carpenters, Local 1622 (Specialty Building Company), 262 NLRB 1244, 1245 n.2 (1982).

Thus, “[w]here a reserved gate system has been properly established, the Board’s analysis with respect to Moore Dry Dock’s third condition – [reasonably close to the situs] – focuses on the proximity of the picketing to the reserved gate rather than to the primary employees’ work location.” IBEW, Local 23 (Renel Construction), 264 NLRB 623, 624 (1983).

The reserved gate system confines the lawful primary picketing to the gate reserved for the primary employer, and it leaves the gate for the neutrals free from picketing. A union’s picketing of that neutral gate is condemned as secondary – i.e., it is conduct which threatens, coerces, or restrains neutral employees and employers. Sheet Metal Workers, Local Union 19 (Delcard Associates), 316 NLRB 426 (1995); Ironworkers District Council (Hoffman Construction), 292 NLRB 562 (1989); IBEW,

¹² See, Janesville Typographical Local 197 (Gazette Printing Co), 173 NLRB 917 (1968) (new construction work is not work “related to the normal operations of the primary employer” so that separate gate system for neutrals was applicable, making union’s picketing secondary, not primary).

Local 98 (The Telephone Man), 327 NLRB No. 113 (1999) (picketing neutral gate for 5 hours before moving to primary gate was violation of 8(b)(4)(i) and (ii)(B)).¹³

Picketing between the primary and neutral gates also becomes a violation of both 8(b)(4)(i) and (ii) (B) of the Act, IBEW, Local 23 (Renel Construction), *supra*. at 624-625; see also, Plumbers, Local 388 (Charles Featherly Construction Co.), 252 NLRB 452, 462-463 (1980), and, of course, so does moving away from the gates and picketing elsewhere. Local 388, Plumbers (Barton Marlow Co), 262 NLRB 126,129 (1982).¹⁴

Where the union confines its picketing to the proper gate for the primary employer and its employees, thus leaving the neutral gate unpicketed and available for neutral employees and employers, it may still violate Section 8(b)(4)(i)(B) where it appeals orally to neutral employees – “induces them” – to attempt to have them cease work, strike, or refuse to perform their work for their employer at the site. Carpenters Local 235 (Howard C. Edmiston, Gen’ Contractor), 174 NLRB 996 (1969) (calling neutral employees attention to the picket line at the site); Int’l Union of Operating Engr’s, Local 675 (Industrial Contracting Company), 192 NLRB 1188 (1971) (telling neutral employees that they would be working behind a picket line); Hoisting & Portable Engrs, Local 701 (Cascade Employers Ass’n), 172 NLRB 1269, n.1, 1271 (1968) (“the whole job is being picketed; I can’t tell you that you can’t work here...let your conscience be your guide....you are a union man.”); District Council of Painters #48, et al (Hamilton Materials, Inc.) (telling neutral employees that primary employer was “unfair”); Los Angeles BTC (Sierra South Development), 215 NLRB 288 (1974) (telling neutral union employees that the picketing was “sanctioned” in response to question as to whether they could work); Electrical Workers (IBEW), Local 98 (Telephone Man, Inc.), 327 NLRB 593 (1999) (harsh comments made to neutral employees by a gate “observer”)

Significantly, where the oral “inducement” is successful – i.e., the employee having been “induced” or “encouraged” to cease his work, actually does so – the Board finds such conduct to amount to “(ii)” “coercion” of his employer. Int’l Union of Operating Engrs, Local 675 (Industrial Contracting Company), 192 NLRB 1188 (1971); Teamsters, Local 542 (Air Support Facilities dba Shaker Express Delivery, Service), 191 NLRB 515 (1971).

¹³ Isolated violations of the gate system do not destroy its efficacy and permit the union to picket both gates. See, e.g., Local 18, Operating Engrs (Dodge-Ireland, Inc.), 236 NLRB 199, n.1 (1978). Where a gate system is “re-established”, picketing both gates is unlawful. Carpenters Local 470 (Mueller-Anderson, Inc.), 224 NLRB 315, 316 (1976); Carpenters, Local 1622 (Specialty Building Company), 262 NLRB 1244 (1982).

¹⁴ Where unions do confine their pickets to the proper gate, the Board still may find a violation if other evidence establishes the union’s secondary intent. Ironworkers, Local 433 (Robert E. McKee, Inc.), 233 NLRB 283, 287 (1977); IBEW, Local 11 (L.G. Electrical Contractors, Inc.), 154 NLRB 766 (1965).

VI

“Signal Picketing” Under Section 8(b)(4)(B)

“Traditional picketing” is thought of as the common picket line involving the patrolling of the entrances to the place of work while carrying placards.¹⁵ But, it is not the only union conduct that may run afoul of Section 8(b)(4)(i) and (ii)(B) of the Act.¹⁶

“Signal picketing”, a term used to describe activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union, may also constitute the predicate **“(ii)”** conduct of a “threat, restraint or coercion” for Section 8(b)(4)(B) purposes. Int’l Union of Operating Engrs, Local 12 (Hensel-Phelps), 284 NLRB 246, 248, n.3 (1987) (massing persons in front of neutral gate without explanation). See also, Ironworkers, Local 433 v. NLRB (R.F.Erectors), 598 F.2d 1154, 1158, n.6 (9th Cir. 1979).

In IBEW, Local 98 (The Telephone Man), 327 NLRB 593 (1999), the Board concluded that certain conduct it labeled as “signal picketing” was impermissible secondary activity. There, the union stationed an “observer” outside the neutral gate at the construction site who wore a sign saying “observer” on one side and carrying the “primary” message of protest on the other. The “observer” spoke with neutral employees about to enter the site, some of whom turned away. The Board held such activity to constitute “signal picketing” and a violation of the Act.

Similarly, in Mine Workers (New Beckley Mining Corp), 304 NLRB 71 (1991), the Board noted that mass demonstrations at night in front of the entrances to a facility could constitute “picketing,” even though there were no picket signs or placards carried by the individuals involved, because the activity sought to enlist the support of neutrals.¹⁷

To a similar effect, the Board has treated demonstration activity involving loud and raucous behavior led by union agents outside the entrances to a neutral’s business as

¹⁵ The Board, however, does not require that there be “patrolling” or “carrying of placards” for there to be “picketing.” Rather, the essential feature of “picketing” appears to be the stationing of individuals at a place of work. Laborers E. Region Org. Fund (Ranches at Mt. Sinai), 346 NLRB 1251 (2006); Sheet Metal Workers Local 15 (Brandon Regional Medical Center), 346 NLRB 199 (2006), enf denied, 491 F.3d 429 (DC Cir. 2007); Compare, Mine Workers, District 12 (Truax-Traer Coal), 177 NLRB 213, 218 (1969) with Lumber & Sawmill Workers Local Union No. 2797 (Stolze Land & Lumber Co.), 156 NLRB 388, 394 (1965); see also, Laborer’s Int’l Union, Local 389 (Calcon Construction Co), 287 NLRB 570 (1987); NLRB v. Woodward Motors, 314 F.2d 53, 58 (2d Cir 1963); Painter’s District Council No. 9 (We’re Associates), 329 NLRB 140 (1999)

¹⁶ As has been noted earlier, “picketing” in front of an entrance to a place of work constitutes both a (i) “inducement” of employees, and a (ii) “threat” or “coercion” of the employer or person. Although other union conduct may also constitute the secondary activity violative of Section 8(b)(4)(ii)(B), such as where a union files a grievance and seeks arbitration of a claim against an employer who can not control a work assignment, and thus the union has “no colorable contractual claim” to the work, Food & Commercial Workers, (Quality Food Centers, Inc.), 333 NLRB 771 (2001), a complete discussion of all the kinds of activities which may constitute “coercion” is beyond the scope of this presentation.

¹⁷ Compare, Local 282, Teamsters (The General Contractors Ass’n of NY), 262 NLRB 528, 540-541 (1982) (persons stationed at entrances without placards or signs was “signal” picketing for Section 8(b)(7) purposes)

“signal” picketing and, thus, “(ii)” “coercion.” Service Employees Union Local Union No. 87 (Trinity Maintenance), 312 NLRB 715 (1993); Metropolitan Reg’l Council of Phila & Vicinity (Society Hill Towers Owner’ Ass’n), 335 NLRB 814 (2001).

VII

Handbilling, Bannering and Other Publicity Under Section 8(b)(4)(B)

Although the wording of Section 8(b)(4)(B) would suggest that handbilling activities designed to move patrons to cease trading with retailers and other “neutral” secondary employers, in furtherance of the union’s primary dispute with a contractor would “coerce” those secondary employers, the Supreme Court has clearly disabused the Board, the lower courts and practitioners of the notion that such activity is always “(ii)” coercion. Edward J. DeBartolo Corp. v. Building & Construction Trades Council (Florida Gulf Coast) (DeBartolo II), 485 U.S.568 (1988),¹⁸

In (DeBartolo II), the Court, reversing and disagreeing with the Board, held that Section 8(b)(4)(ii)(B) does not prohibit *peaceful* handbilling that urges customers not to patronize a secondary employer, *when unaccompanied by picketing*. The Court stated:

“There is [little] reason to find in the language of [Section] 8(b)(4)(ii), standing alone, any clear indication that handbilling, without picketing, “coerces” secondary employers. The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.” *Id.* at 580.

The Court noted that the distribution of the handbills was not accompanied by violence, picketing, or patrolling.¹⁹ Consequently, it analyzed the statutory provision in that light. Concerned that the Board’s interpretation of it would interdict otherwise peaceful “speech” and thus collide with First Amendment rights, it interpreted the provision in accord with its view that Congress intended to permit such consumer “publicity,” restricting the interpretation of barred “publicity” to “picketing publicity.”²⁰

¹⁸ It is important to note that the Court was not dealing with the issue of whether the activity constituted a “(i)” ‘inducement’ of individuals to “cease their work” or to “refuse to perform services”. The question dealt with in DeBartolo II by the Court was only whether the handbilling activity constituted a “(ii)” ‘threat, coercion or restraint’ of the secondary employer. See, Warshawsky & Co. v. NLRB, 182 F.2d 948 (DC Cir. 1999), (distinguishing DeBartolo II and finding “inducement” of employees to cease work by handbills unaccompanied by picketing)

¹⁹ In this regard, the Court noted, “[t]here is no suggestion that the leaflets had any coercive effect on customers of the mall. There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall.” *Id.* at 578.

²⁰ The Court stated: “[A]mong the concerns of the proponents of the provision barring threats, coercion or restraints aimed at secondary employers was consumer boycotts of neutral employers carried out by picketing. At no time did they suggest that merely handbilling the customers of the neutral employer was one of the evils at which their proposals were aimed. Had they wanted to bar any and all nonpicketing

Subsequent to the decision in DeBartolo II, the Board has made it clear that consumer handbilling of secondary employers, unaccompanied by picketing or other forms of “coercive” activity, will not violate Section 8(b)(4)(ii)(B) of the Act. Plumbers & Pipefitters Local 32 (Ramada, Inc.), 302 NLRB 919 (1991) (union letter threatening peaceful handbilling consumer boycott activity was not unlawful).²¹ The fact that the handbilling may contain information irrelevant to the primary labor dispute does not put the activity inside of the “(ii)” prohibition or deprive the activity of being otherwise lawful under the Act. See, Service Employees Local 399 (Delta Airlines), 293 NLRB 602 (1989).

This is not to say that all union “handbilling” activity is lawful. Rather, where the handbilling is accompanied by simultaneous picketing, the handbilling itself has been held to be unlawful. See, e.g., Local 732, Teamsters (Servair Maintenance, Inc.), 229 NLRB 392 (1977); Building & Construction Trades Council, Nashville (Castner-Knott Dry Goods Store), 188 NLRB 470 (1971)²²

And, in K-Mart Stores, Inc., 313 NLRB 50 (1993), the Board adopted the ALJ’s view that handbilling, when accompanied by other tactics such as skits, chanting, and other exercises in the parking lot of the neutral employer, constituted unlawful activity under Section 8(b)(4)(ii)(B).

But, some forms of “street theater” engaged in by unions at the premises of secondary employers may not survive a DeBartolo II analysis because they are not considered picketing. Sheet Metal Workers Local 15 v. NLRB (Brandon Regional Medical Center), 491 F.3d 429 (DC Cir 2009). In that case, the Court of Appeals for the DC Circuit refused to enforce the Board’s order finding a violation of Section 8(b)(4)(ii)(B). It, rather, noted that the activity – a mock funeral procession and related activity – was 100 feet away from the entrance of the secondary employer’s facility and did not engage in any activity which might demonstrate “signal picketing,” i.e., seeking to have secondary employees cease work or otherwise make common cause with the demonstrators.

In other situations, the Board has concluded that simultaneous picketing and handbilling “publicity,” which calls for a total boycott of the products of the secondary employer, may indeed violate the Act. Compare, e.g., Operating Engrs Local 139, (Oak

appeals, through newspapers, radio, television, handbills, or otherwise, the debates and discussions would surely have reflected this intention. Instead....Congressman Griffin, cosponsor o the bill that passed the House, stated that the bill covered boycotts carried out by picketing neutrals but would not interfere with the constitutional right of free speech.” *Id.* at 584.

²¹There, the Board analyzed the union’s letter “threatening” a consumer boycott and handbilling campaign in light of the holding in DeBartolo II, and found that such activity would have been lawful in engaged in. Hence, relying on NLRB v. Servette, Inc., 377 U.S. 46, 57 (1964), where the Supreme Court held that a “threat” of protected conduct – lawfully handbilling – was itself protected, the Board in Ramada found the union’s letter not to be “coercive” of the secondary employer under Section 8(b)(4)(ii)(B).

²² The Board’s decisions in Servair Maintenance and Castner-Knott do not appear to have been adversely impacted by the decision in DeBartolo II where the Court held that similar conduct was *unaccompanied by picketing*.

Construction), 226 NLRB 759 (1976), with K&K Construction Co. v. NLRB, 592 F.2d 1228 (3d Cir. 1979).

“Bannering” activity, though, represents a unique middle-ground between “picketing” activity, which may constitute “(ii)” “coercion,” and another form of “publicity.” “Publicity,” which the Supreme Court suggested in DeBartolo II was not within the intent of Congress as conduct to be regulated by Section 8(b)(4)(B). Bannering” activity, *per se*, has yet to be treated by the Board as within or without the proscription of “(ii).”²³

Although several complaints were issued by the Board’s General Counsel challenging the legality of such activity, and although decisions were issued by various Administrative Law Judges, no Board decisions have been issued. Those complaints have challenged the technique used – peaceful activity not associated with patrolling – because, among other reasons, the text of the message on the banners was “false or misleading” and/or that the activity constituted activity that was the equivalent of picketing.

But the General Counsel and its Regional Directors have been unsuccessful in their attempts to secure Section 10(l) injunctive relief from the Courts on such argument. For example, in Overstreet v. Carpenters Local 1506, 409 F.3d 1199 (9th Cir. 2005), the Ninth Circuit affirmed the denial of an injunction by the district court in such circumstances. Convinced that the “bannering activity” might indeed be protected speech privileged by the First Amendment, the Court noted that there was no other “coercive” activity involved.²⁴ See also, Kohn v. Southwest Reg’l Council of Carpenters, 289 F. Supp2d 1155 (C.D. Cal 2003); Benson v. Southwest Reg’l Council v. Carpenters Local 184 and 1498, 337 F. Supp.1275 (D. Utah 2004).

Thus, it appears the mere fact that “the banner presents its message forcefully does not transform its communicative nature into [prohibited] conduct.” Gold v. Mid-Atlantic Reg’l Council of Carpenters, 407 F. Supp 2d 719 (D. Md. 2005).

These decisions by the Courts, and the lack of any decisions by the Board on the issues, have basically put a hold on the processing of charges concerning “bannering” before the Board and its General Counsel.²⁵

²³ “Bannering” takes the form of the display of large banners or signs (sometimes 4’ x 20’ in dimension), held stationary by persons at each end and/or the middle, at or near the secondary employer’s premises, suggesting the existence of a “labor dispute” and naming the secondary employer, but not the primary employer” on the banner.

²⁴ The Ninth Circuit distinguished another case involving similar bannering activity that had arisen in that Circuit, where an injunction had been granted under the Norris-LaGuardia Act, because the banner had used the word “rat” on its banner in such a way as to mislead patrons. See, San Antonio Community Hospital v. So Cal Dist. Council of Carpenters, 115 F.3d 685 (9th Cir. 1997). The banners involved in Overstreet did not suffer from the same infirmity.

²⁵ See, Regional Office Procedures for Handling Pending Section 8(b)(4)(ii)(B) Charges Involving Banner, etc., NLRB General Counsel Operations Management Memo 05-14 (Nov 29, 2004), as supplemented by NLRB General Counsel Operations Management Memo 06-42 (Feb 15 2006).

As a result, therefore, what remains unclear presently in “bannering situations” is when such conduct may constitute “picketing” – if at all – mindful of the fact that the Board has historically concluded that the use of placards is not a *sine que non* for “picketing,” and a most important factor is stationing persons at the entrance to the place of work, and whether such conduct, if not “picketing,” otherwise falls within the scope of the **“(ii)”** prohibition on “coercion” of neutral employers.²⁶

Thus, until the Board provides guidance, future challenges to “bannering” activity might be focused on such factors as, but not limited to, the following:

- a) The location of the banner to a facility’s entrances and exits;
- b) The “movement” the banner or the persons holding it while displayed;
- c) The use of union agents patrolling in front of or to the side of the banner;
- d) Activities of the persons with the banner toward workers entering and exiting;
- e) Noise levels and raucous activities, if any, of the persons with the banner;
- f) Conduct, if any, of the bannerers in the distribution of written literature; and
- g) Presence of any “intimidating” or “confrontational” behavior of the bannerers toward secondary employees or customers.

VIII **Conclusion**

This “primer” on Section 8(b)(4)(B), as it relates to construction site picketing and associated handbilling and bannering activity, simply scratches the surface of the law developed since 1947. With the addition of new Board Members recently, it can be anticipated that some new and perhaps surprising developments in the law under Section 8(b)(4)(B) will be forthcoming. The material presented in this ‘primer’ should assist the practitioner in seeing those new developments with the historical perspective of what the Board has done in the past.

²⁶ See, Laborers E. Region Org. Fund (Ranches at Mt Sinai), 346 NLRB 1251 (2006).