Legal Alert: Board Finds "Shame On" Banners Do Not Violate NLRA

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The National Labor Relations Board (NLRB) recently issued a decision that confirms speculation that the newly reconstituted Board will be inclined to issue more pro-labor rulings. In *Carpenters & Joiners of Am. (Eliason & Knuth of Ariz. Inc.),* 335 N.L.R.B. No. 159 (2010), the Board held that a union did not violate the National Labor Relations Act's (NLRA)'s prohibition on secondary boycotts by displaying "shame on" banners attacking neutral employers who were doing business with companies with whom the union had a labor dispute. In finding that the display of stationary banners does not violate the Act, the Board held that the language of the Act and its legislative history "do not suggest that Congress intended Section 8(b)(4)(ii)(B) to prohibit the peaceful stationary display of a banner."

Background

In this case, the union was involved in a labor dispute with four employers in the construction industry. As part of this dispute, the union displayed large banners at the facilities of three companies who did business with the primary employers. The union did not have a labor dispute with any of these secondary employers. The banners were 3 or 4 feet high and 15 to 20 feet long and read "SHAME ON [secondary employer]" in large letters, flanked on either side by "Labor Dispute" in smaller letters. At one of the locations, a restaurant called RA Tempe, the middle section of the banner read, "DON'T EAT 'RA' SUSHI."

At each location, the banners were held stationary by union representatives. The union representatives also handed out fliers that explained that the dispute was with the primary employers and that the union believed by using one of the contractors, the secondary employers were contributing to the undermining of area labor standards.

Subsequently, one of the primary employers and two of the secondary employers filed unfair labor practice charges with the NLRB, arguing that the union violated the NLRA by displaying banners at the secondary employers' facilities.

Analysis

The secondary boycott provision of the NLRA makes it an unfair labor practice for a labor organization or its agents to "threaten, coerce, or restrain any person engaged in commerce" where the purpose of such activity is to force that person to cease doing business with another person.

The Board held that the text of the Act and its legislative history establish that Congress did not intend to bar displays of stationary banners. According to the Board, to be illegal under the secondary boycott provision, the activity must "threaten, coerce or restrain." In this case, the Board found no evidence that the union threatened, coerced or restrained the secondary employers or anyone else. The Board held that Supreme Court precedence interprets the words "coerce" or "restrain" to require "more than mere persuasion" and held that "here, however, there is nothing more."

In the past, the Board has interpreted this provision to prohibit picketing and disruptive or otherwise coercive nonpicketing conduct by a union directed toward a neutral employer. However, the Board has found that peaceful handbilling does not violate the secondary boycott provision. According to the Board, the display of stationary banners in this case is more like handbilling and is noncoercive conduct falling outside the proscriptions of the secondary boycott provisions. "Nothing in the legislative history suggests that Congress intended to prohibit the peaceful, stationary display of a banner on a public sidewalk."

The Board found that the banner displays in this case did not constitute such proscribed picketing because they did not create a confrontation. The Board noted that the union representatives did not hold the banners in a way that blocked the entrance to the secondary sites or required those wishing to enter or exit the sites to confront the banner holders. "Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling."

The dissent argued that the majority opinion puts neutral employers "right back into the fray" by allowing unions to target secondary employers with large banners and predicted that the decision will foster an increase in secondary boycott activity.

Employers' Bottom Line:

The Board's decision likely reflects its inclination to issue more labor-friendly opinions in the future. In light of this trend, it is essential that employers ensure their workplaces have an atmosphere of mutual dignity and respect. Ford & Harrison attorneys and F&H Solutions Group consultants have many years of experience assisting employers in this area. If you have any questions about the issues addressed in this Alert, please contact the Ford & Harrison attorney with whom you usually work.