United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 26, 2003

TO : Rochelle Kentov, Regional Director
Margaret Diaz, Regional Attorney
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Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Carpenters Local 1765 (Capform, Inc.)
Cases 12-CC-1259

Central/North Florida Carpenters
Regional Council (Capform, Inc.)
Case 12-CC-1260

Carpenters Local 1765 (Ron Jon Surf Shop)
Case 12-CC-1261

560-2575-6746
560-2575-6767-2500
560-7540-8060-6717
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The Region submitted these cases for advice on whether the Union threatened, coerced, or restrained secondary employers, in violation of Section 8(b)(4)(ii)(B) of the Act, by placing banners near their premises that contained language identifying both the primary and secondary employers to the labor dispute. These cases also present the issue of whether the Union's distribution of handbills violated Section 8(b)(4)(ii)(B) because the handbills allegedly contained false statements about the primary employer.

We find that there is insufficient evidence of coercion to conclude that the use of the banner at one location violated the Act. However, the use of the banner at another location, accompanied by other conduct, did violate the Act. We also conclude that the language of the handbills did not violate the Act.

FACTS

The primary labor dispute in this case is between Carpenters Local 1765 and Central/North Florida Carpenters Regional Council (collectively "the Union") and Capform,

Inc. ("Capform"). The Union has been attempting to organize the employees of Capform for over 18 months. Capform is a concrete subcontractor that typically works on large commercial projects. Benko Construction, Inc., a general contractor constructing two condominiums in Brevard County, Florida, hired Capform to perform the structural concrete work. Several subcontractors other than Capform are present at each of the construction sites.

A. THE UNION'S CONDUCT AT THE WHITLEY BAY CONSTRUCTION SITE.

One condominium project is known as Whitley Bay. Capform employs between 22 and 30 workers at this site, most of whom are carpenters, carpenters helpers, and laborers. They normally work Monday to Friday from 7 a.m. to 3:30 p.m. Capform expects to be working at this site until June 2003. There is no reserved gate system in place.

On December 16, 2002, the Union began to display a 4' x 20' banner on public property near an access road that leads into the site and also an unrelated parking lot from the south.[1] Since then the Union has regularly displayed the banner at that location from 7 or 9:30 a.m. to 1 p.m., but usually not when Capform employees are arriving to or leaving from work. The banner reads as follows:

> Shame on Whitley Bay
>
> Labor Dispute with Capform Labor Dispute with Capform

While the words "Shame on Whitley Bay" are in large red letters, the words "Labor Dispute with Capform" are in smaller black lettering. Two or three Union agents support the banner.

Since the Union began to display the banner, two to six Union agents have also distributed four different handbills at this site. They distributed the handbills at

[1] The banner apparently faces away from the access road and toward the public highway.

a second entrance on the west side of the site that was far removed and not visible from the location of the banner. The employees of the various subcontractors, including Capform, parked their cars across from this entrance and entered the construction site there. The Union agents, who did not patrol and usually left by noon, distributed handbills to all of the subcontractors' employees. One handbill, which contains an area standards message, states that Capform provides its employees with "substandard wages and benefits."

B. THE UNION'S CONDUCT AT THE RON JON RETAIL STORE AND THE CONNECTION WITH THE CAPE CARIBE CONSTRUCTION SITE.

The second condominium project is known as Cape Caribe. Capform employs 26 workers at this site, most of whom are carpenters, carpenters helpers, and laborers.

In May 2002, Towne Realty, the real estate company responsible for developing the Cape Caribe condominium, received a 5-year license from Ron Jon Surf Shop ("Ron Jon") to use the latter's name to promote the condominium.[2] Ron Jon, which normally operates retail outlets for items such as surfing equipment and swimwear, occasionally licenses its name to condominiums in Florida. It has several stores across the United States, with the relevant store here being located in Cocoa Beach, Florida, only three miles from the Cape Caribe condominium project. This store is a popular tourist attraction.

At its Cocoa Beach store, Ron Jon allows condominium developers to display time-share, promotional information on part of its front counter. Since around November 2002, Towne Realty has used this space and John Genua, a Towne Realty representative, and four to five of his assistants have worked there at various times.

Between January 10 and 15, 2003, Ed Moriarty, Ron Jon's president, received a packet of materials from Bobby McCoy, a Union organizer. Moriarty then called McCoy to ask about the materials, which included allegations that Capform had committed unfair labor practices and OSHA violations. McCoy responded that the Union had a labor dispute with Capform, which was a subcontractor on the Cape Caribe project. Moriarty informed McCoy that Ron Jon had

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[2] The signs at the Cape Caribe project do not yet display Ron Jon's name, and the licensing agreement prohibits Cape Caribe from marketing itself as a Ron Jon resort until September 2003.

neither an ownership interest in Cape Caribe nor anything to do with Capform. McCoy replied that Ron Jon would profit from Cape Caribe's use of the Ron Jon name, and because of the labor dispute, the Union would "make sure the local community knew about Ron Jon's association with Capform." After Moriarty again stated that Ron Jon had no involvement with Capform, McCoy repeated what he had just said. McCoy did not respond when Moriarty asked if the Union intended to picket or go to the newspapers.

On February 18, 2003, the Union began to display a 4' x 20' banner on public property near the southwest corner of Ron Jon's Cocoa Beach store, near a four-way intersection. On at least six dates since then, the Union has displayed the banner at that location for one to three hours either in the morning or the afternoon. The banner, which is again supported by two or three Union agents, is almost identical to the one being displayed at the Whitley Bay site except that the large, red text in the middle of the banner reads in two lines, "Shame on Cape Caribe – A Ron Jon Resort." Tall grass where the banner is located somewhat obscures the "with Capform" language across the bottom of the banner. Because the Ron Jon employee parking lot is diagonally southwest of the store, employees who use the parking lot must walk by the banner on their way to work.

From the time the Union began to display the banner, two to four Union agents also began to distribute handbills near the banner in front of the store. Some handbillers have positioned themselves by the south entrance to the store, which is around 50 feet away from the banner. The handbill contained an area standards message and stated that Capform was providing its employees with "substandard wages and no benefits."

On the first day of the handbilling, Ron Jon had one Union handbiller by the store's south entrance removed. The police issued this individual a trespass warning. The next day, the same individual trespassed, but the police did not arrest him because he left before they arrived.

On another occasion, a Union handbiller followed Genua, the Towne Realty representative, into Ron Jon. This individual stated that McCoy had been to Ron Jon's corporate office a week before and had informed Ron Jon's president that the Union would be "picketing in front of the store." In response to a question, the individual stated that the Union would be present for "a week or a month, however long it takes for the dispute to be resolved."

On February 20, a Union representative used a video camera outside the Ron Jon store. Shortly after the banner was displayed at Noon, he stood on the other side of the street from the store. He was about 50 to 100 feet from the store's south entrance. He first panned the sidewalk in front of the store's west and south entrances with the camera and then moved closer by proceeding to the street corner south of the banner. He continued to focus on the west and south doors for about two or three hours. Several Ron Jon employees told the assistant general manager that they preferred to remain in the store on their breaks because they did not want to be videotaped.

C. INFORMATION REGARDING THE STATEMENTS ON THE UNION'S AREA STANDARDS HANDBILLS.

Capform alleges that the area standards handbills the Union distributed at the Whitley Bay and Ron Jon locations falsely state that it pays its workforce substandard wages and provides either substandard or no benefits. With the exception of two employees who earn $8.50 and $11 per hour, respectively, Capform pays its journeyman carpenters between $12 and $15 per hour. In addition, Capform offers health insurance benefits to its employees after one year of employment and payroll records show that Capform pays $137.50 per month toward the health insurance premiums of those employees. Capform also states that all of its employees are eligible to participate in a 401(k) plan. In comparison, Capform notes that the U.S. Department of Labor (USDOL) Wage Determination for Brevard County, excluding Cape Canaveral Air Force Station, Patrick Air Force Base, Kennedy Space Flight Center, and the Malabar Radar Site, is $11.78 per hour and nothing for fringe benefits for carpenters on building construction projects.

The standard Union contract for the area provides for $16 per hour in wages plus $5 per hour in benefits. The Union claims that it knows from talking to Capform employees during the past two years that they earn far below the standard contract rate, between $9 and $11 per hour in wages. The Union also claims that it also learned from those conversations that Capform employees do not receive benefits during their first year of employment and that most employees work less than one year.

The Union also asserts that Capform improperly relies on the USDOL Wage Determination that excludes several federal facilities located near the Whitley Bay and Cape Caribe construction sites. Contractors at those federal facilities are subject to the Service Contract Act. The current USDOL Wage Determination is $17.06 per hour in wages and $4.92 per hour in benefits for carpenters

performing building construction work at those federal facilities. The federal government appears to base these figures on the rates set forth in the Union's standard contract.

ACTION

We conclude that, with one exception, the charges should be dismissed in these cases, absent withdrawal. First, there is insufficient evidence of coercion to find that the Union's display of the banner at the Whitley Bay site violated the Act. However, the totality of the circumstances show that the Union's activity at the Ron Jon location was coercive and, therefore, was tantamount to picketing and violated Section 8(b)(4)(ii)(B). Second, the Union's distribution of handbills at both locations was not unlawful because the statements in the handbills did not remove them from DeBartolo protection.

A. THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE UNION'S DISPLAY OF THE BANNER SHOW THAT IT WAS NOT UNLAWFULLY COERCIVE AT WHITLEY BAY BUT WAS SO AT RON JON.

Traditional union picketing usually involves individuals patrolling while carrying placards attached to sticks.[3] Such activity involves a "mixture of conduct and communication" and the response it seeks to elicit from the public, unlike handbilling, does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] often provides the most persuasive deterrent to third persons about to enter a business establishment."[4] Thus, unlike handbilling, which is a non-coercive manner of persuading others to take action against a secondary employer, picketing is subject to regulation because the "conduct element" elicits a response apart from any message being presented.[5]

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[3] See generally Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (citations omitted).

[4] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 580 (1988) (citations omitted).

[5] Id. at 580.

The presence of traditional picket signs and/or patrolling by union agents is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.[6] "One of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."[7] Furthermore, the Board has developed the concept of "'[s]ignal picketing' ... to describe activity, short of a true picket line, which acts as a signal to neutrals that sympathetic action on their part is desired by the union."[8]

In determining whether a union is engaged in activity that is the equivalent of either lawful handbilling or unlawful picketing, the Board looks to whether, under the totality of the circumstances, conduct rather than speech is being used to elicit the desired sympathetic response. For example, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute picketing.[9] The photographing of neutrals as they pass through an entrance has also been found to be an indicium of picketing.[10] The

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[6] See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968).

[7] Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965) (citation omitted).

[8] Operating Engineers Local 12 (Hensel Phelps), 284 NLRB 246, 248 n.3 (1987) (citation omitted).

[9] See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (finding mass picketing in violation of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Service & Maintenance Employees Local 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)").

[10] See General Service Employees Local 73 (Andy Frain), 239 NLRB 295, 306, 307 (1978) (finding union's handbilling was picketing that violated 8(b)(4)(i) and (ii)(B) where union distributed handbills, displayed signs in parked cars,

Board has also found a union's prior traditional picketing at the same facility significant because subsequent conduct may be merely a continuation of the prior picketing.[11]

Applying the preceding principles to this case, we conclude that the Union's activity at Whitley Bay did not amount to traditional picketing that unlawfully coerced the secondary employer. However, we would reach the opposite conclusion regarding the Union's activity at Ron Jon.

1. Whitley Bay.

The circumstances at Whitley Bay show that there was insufficient evidence that the secondary employer was coerced to justify a Section 8(b)(4)(ii)(B) complaint allegation. First, the language on the banner was broadly directed at the general public and did not specifically target potential customers of Whitley Bay.[12] Second, the

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photographed neutrals, and previously picketed facility; finding union's photographing under circumstances inherently coercive where it took place at reserved neutral gate and where cameras had no film).

[11] See, e.g., Andy Frain, 239 NLRB at 306; Kansas Color Press, 169 NLRB at 283, 284 (finding union's handbilling and display of large sign was picketing in violation of 8(b)(7)(B) where, among other things, union had displayed the sign and engaged in five years of traditional picketing at the facility); Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 393, 394 (1965) (finding picketing in violation of 8(b)(7)(B) where the same union agents who had engaged in traditional picketing at the facility for over a year were posted in front of employer's office and began to distribute handbills).

[12] We also note that the banner accurately identifies the primary employer with whom the Union has a dispute. Consequently, this case is distinguishable from recent cases where the General Counsel authorized complaint based on a union's display, near a secondary employer's facility, of a banner that failed to name the primary employer. Such conduct may have misled individuals approaching the secondary employer's premises into believing that the primary labor dispute was with the secondary employer, and caused those individuals to improperly withhold patronage or deliveries, and thereby coerced the secondary employer. See, e.g., Carpenters Local 209 (King's Hawaiian Restaurant & Bakery), Case 31-CC-2103, Significant Appeals Minute dated September 25, 2002; Carpenters Local 1506 (Associated

location and positioning of the banner was innocuous. The Union stationed the banner, which was supported by two or three Union agents, near the entrance to the access road that leads into the construction site from the south. The banner pointed away from the access road and toward the public highway. Finally, there was no accompanying mass activity, photographing or videotaping, or prior traditional picketing at this location. Although the Union distributed handbills, this occurred at the west entrance that was far removed from the location of the banner. Thus, because the totality of the circumstances fail to show that the secondary employer would have been coerced by the Union's activity, the Union's conduct did not violate the Act.[13]

2. Ron Jon Surf Shop.

At the same time, the totality of the circumstances at Ron Jon show that the Union's activity amounted to confrontational conduct that unlawfully coerced the secondary employer. In addition to the large banner being supported by two to three Union agents, an additional two to four agents distributed handbills near the banner.[14] One of these individuals repeatedly trespassed on Ron Jon's property and the same or another individual followed Towne Realty representative Genua into the Ron Jon store. Two days after the banner was first displayed, the Union also videotaped the west and south entrances to the store, which resulted in Ron Jon employees informing management that they would take their breaks inside because they did not want to be videotaped. This evidence demonstrates that the Union's activity had a confrontational element to it that would have elicited the desired sympathetic response of a consumer boycott regardless of any message the Union may have been presenting. As a result, the secondary employer would have been unlawfully coerced by the Union's conduct. Thus, we conclude that this activity violated Section 8(b)(4)(ii)(B).

General Contractors, San Diego Chapter), Case 21-CC-3307, Significant Appeals Minute dated August 21, 2002.

[13] Cf. Alden Press, 151 NLRB at 1669 (finding that actual picketing in public areas did not violate Section 8(b)(4)(ii)(B)).

[14] As noted above, however, the banner itself is not misleading.

B. THE UNION'S DISTRIBUTION OF HANDBILLS WAS NOT UNLAWFUL.

The Union distributed area standards handbills at both the Whitley Bay and Ron Jon locations. Charging Party-Capform asserts that certain statements made in those handbills are false and, as a result, remove them from the protection accorded handbilling under DeBartolo.[15] Specifically, Capform asserts that the handbills falsely state that it pays its workforce "substandard" wages and provides either "substandard" or "no" benefits. We reject Capform's claims.

First, the "substantial" claim is a truthful traditional area standards claim. A union concerned with safeguarding area standards typically seeks to protect the terms of employment set forth in negotiated labor agreements from being undermined by competing, unorganized employers who can underbid their organized counterparts because of the lower labor costs they normally enjoy.[16] Thus, the point of reference for area standards purposes are the wage and benefit levels set forth in the Union's standard contract for the area.[17] The contractual wage rate exceeds the highest hourly wage that Capform provides by at least $1 per hour. Also, the Union's standard contract provides for $5 per hour in benefits, and Capform does not contend that it provides it employees with this level of benefits. Accordingly, the handbills accurately state that Capform employees receive wages and benefits below the standard contractual rates for the area.

Second, although the handbill the Union distributed at Ron Jon is inaccurate insofar as it claims that Capform employees received "no" benefits, we conclude that that inaccuracy was not so telling as to remove the DeBartolo protection. The benefits claim focused on health care.

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[15] See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. at 580.

[16] See, e.g., Retail Clerks Local 899 (State-Mart, Inc.), 166 NLRB 818, 823 (1967), enfd. per curiam 404 F.2d 855 (9th Cir. 1968).

[17] Nothing in the Union's handbills made any USDOL Wage Determination the point of reference. Thus, the fact that Capform's wage rates exceed those set forth by USDOL does not render false the Union's substandard claim with respect to its contract.

For example, the handbill repeatedly states that the "community could end up paying the tab for employee health care." In this context, the Union had some basis for claiming that the employees received "no" benefits. Through conversations with Capform employees, the Union had learned that, as Capform acknowledges, they did not receive health benefits until after one year of employment. Employees further told the Union that many Capform employees worked less than one year, which resulted in many employees not having health benefits. Furthermore, the handbill repeatedly states that Capform is providing substandard terms and conditions of employment and that this will have a negative impact on the surrounding community. Thus, although the handbill is inaccurate inasmuch as Capform does offer a 401(k) plan to all employees, the primary message of the handbill is that Capform provides "substandard," rather than "no," benefits. As previously noted, this claim is true. Accordingly, we conclude that complaint should not issue based on the "no" benefits statement in the Union's handbill.[18]

In sum, we conclude that the statements in the handbills did not amount to a reckless falsehood that would remove the Union's distribution of handbills from DeBartolo protection.

B.J.K.

[18] See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.... Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.") (citations omitted). See also Smith v. Cuban American Nat'l Foundation, 731 So. 2d 702, 706-707 (Fla. Dist. Ct. App. 1999) (applying the substantial truth doctrine set forth in Masson), review denied 753 So. 2d 563 (Fla. 2000).