International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO *and* Desert Sun Enterprises Limited d/b/a Convention Technical Services. Case 28–CC–115255

December 27, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On July 28, 2014, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief to the Charging Party's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.[3]

On October 9, 2013, the Respondent Union sent a letter to an alliance of craft unions seeking their approval and cooperation in its intended area-standards picketing of the Charging Party, the primary employer in the dispute.[4] That day, the Respondent also sent copies of the same letter to a neutral employer, the Las Vegas Convention and Visitors Authority (LVCVA). LVCVA is the authority that manages the convention center where the Charging Party provides portable electrical services and where many neutral employers perform work. In the parlance of the Board's secondary-boycott precedent, the convention center is a "common situs"—a site where an employer with which a union has a labor dispute performs work, but where one or more neutral employers that have nothing to do with that dispute also perform work. The letter to neutral employer LVCVA is the subject of the complaint allegation in this case that the Respondent violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act.[5]

For over 50 years, the Board has held that if a union notifies neutral employers at a common situs that it intends to picket the primary employer, the union "has an affirmative obligation to qualify its threat by clearly indicating that the picketing would conform to *Moore Dry Dock* standards, or otherwise be in uniformity with Board law."[6] E.g., *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 749 (2004) (internal quotation marks and footnote omitted), enfd. 251 Fed. Appx. 101 (3d Cir. 2007). Here, the General Counsel and the Respondent Union entered into a stipulation of facts that proved the Respondent had not qualified its threat to picket in the letter it sent to neutral employer LVCVA as required by this precedent. The judge accordingly granted the General Counsel's motion for summary judgment and found that the Respondent thereby violated Section 8(b)(4)(ii)(B) of the Act.[7] Unusually, both the General Counsel and the Respondent argued to the judge and then to the Board that the Board should overrule its decades-old unqualified-threat rule. We decline to do so, and we

[1] Associated Builders and Contractors, Inc. (ABC); the Building and Construction Trades Department, AFL–CIO (BCTD); and, jointly, the Council on Labor Law Equality (COLLE) and the Associated General Contractors of America (AGC) filed amicus curiae briefs. The Respondent filed a combined response to the ABC and COLLE/AGC briefs, and the Charging Party filed a response to the BCTD brief.

[2] Member Emanuel is recused and took no part in the consideration of this case.

[3] We shall modify the judge's recommended Order and substitute a new notice to conform to the Board's standard remedial language.

[4] Specifically, the letter read:

Please be advised that [the Respondent] is requesting a strike sanction against [Charging Party] Convention Technical Services. This is for any all jobs because of not paying area standards. Your cooperation in this matter would be greatly appreciated.

[5] In relevant part, Sec. 8(b)(4)(ii)(B) makes it an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person."

[6] The four *Moore Dry Dock* criteria, set forth in *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950), aid the Board in evaluating whether union picketing lawfully pressured the primary employer at the common situs or unlawfully pressured a neutral (or "secondary") employer that performs work at the same location. *Teamsters Local 560 (County Concrete Corp.)*, 360 NLRB 1067, 1067 (2014). Such picketing is presumptively lawful if "(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 situs; and (d) the picketing discloses clearly that the dispute is with the primary employer." Id. at 1067 fn. 3. Even if the picketing is presumptively lawful under these criteria, the Board will still find it unlawful if other evidence shows the union intended to enmesh the neutral employer in the dispute. Id. at 1067–1068.

[7] The judge imprecisely described the violation as a violation of Sec. 8(b)(4)*(i) and (ii)(*B), as the General Counsel alleged in the complaint. Sec. 8(b)(4)(i), however, covers conduct directed at employees, whereas the facts here only involve a coercive letter sent to a neutral employer, conduct covered by Sec. 8(b)(4)(ii). Because no party specifically challenged this point in its exceptions and the distinction is immaterial to the remedy, we do not formally reverse the mistaken finding here.

adopt the judge's grant of summary judgment and find that the Respondent violated Section 8(b)(4)(ii)(B).[8]

Having carefully reviewed our precedent[9] and adverse decisions from the United States Courts of Appeals for the Ninth[10] and District of Columbia[11] Circuits, we acknowledge that the Board has yet to clearly explain the unqualified-threat rule. Nevertheless, we firmly believe that this longstanding rule represents a reasonable interpretation of Section 8(b)(4)(ii)(B) and is necessary to further important policy objectives.

Underlying our rule is Congress's deep concern with ensuring that neutral employers remain free from entanglement in the labor disputes of others. Indeed, "the concern that motivates all of § 8(b)(4) [is] 'shielding . . . unoffending employers and others from pressures in controversies not their own.'" *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 156 (1983) (quoting *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951)). Section 8(b)(4) "was drafted broadly to protect neutral parties, the helpless victims of quarrels that do not concern them at all. Despite criticism from President Truman as well as from some legislators that the secondary boycott provision was too sweeping, the Congress refused to narrow its scope. . . . Congress intended its prohibition to reach broadly." *Longshoremen ILA v. Allied International Inc.*, 456 U.S. 212, 225 (1982) (internal quotation marks and citations omitted). Accordingly, as the agency charged with enforcing the Act, the Board must ensure that neutral parties receive the broad protection Congress intended they should have "from pressures in controversies not their own."

A union's broadly worded and unqualified notice, sent to a neutral employer, that the union intends to picket a worksite the neutral shares with the primary employer is inherently coercive. Without any details, such a notice is ambiguous about whether the threatened picketing will lawfully target only the primary employer or will unlawfully enmesh the neutral employer. The neutral would understandably question why the union is sending a strike notice to an employer with no role in the dispute, and this question would reasonably lead it to at least suspect, if not believe, that its business would be targeted by the picketing and that it would be prudent to cease doing business with the primary employer to avoid losses. It would be unrealistic to expect neutral employers, many with little experience in arcane common-situs picketing law, to assume the union would avoid enmeshing them in the picketing. Thus, an unqualified picketing threat communicated to a neutral at a common situs is an ambiguous threat, and such an ambiguous threat enables a union to achieve the proscribed objective of coercing the neutral employer to cease doing business with the primary employer—the very object a union seeks to achieve when it makes a blatantly unlawful threat to picket or unlawfully pickets a neutral. Accordingly, as our dissenting colleague refuses to acknowledge, it is reasonable to conclude that when a union sends to a neutral an unqualified and therefore ambiguous notice of its intent to picket a common situs, it does so with an object to coerce the neutral to cease doing business with the primary employer. A union may still lawfully inform a neutral of its intent to picket as long as it qualifies the notice by clearly indicating that its picketing will comply with legal limitations on such picketing.

In holding that unqualified common-situs picketing threats sent to a neutral employer violate Section 8(b)(4)(ii)(B), we do not presume that the union's threat is a threat to picket in an unlawful manner. Rather, we base our holding on the rationale set forth above: that, taken together, the locale of the threatened picketing (a worksite shared by the primary employer and one or more neutral employers), the target of the picketing threat (one of the neutrals), and the threat's unqualified and therefore ambiguous nature (leaving the neutral uncertain whether picketing at the common situs will be lawfully confined to the primary or will unlawfully enmesh the neutral) support a finding that an object of the threat is to unlawfully coerce the neutral within the meaning of Section 8(b)(4)(ii)(B).[12] We recognize that a

[8] Charging Party Convention Technical Services argues in its exceptions and in subsequent motions to supplement the record that the picketing the Respondent threatened had the objective of pressuring the Charging Party to recognize the Respondent Union as the representative of the Charging Party's employees, not of pressuring the Charging Party to pay area standards, as the Respondent's letter to the LVCVA stated. Whether payment of area standards or recognition was the Respondent's ultimate goal vis-à-vis the primary employer has no bearing on the General Counsel's complaint allegation that the Respondent violated Sec. 8(b)(4)(ii)(B) by unqualifiedly threatening to picket with the object of forcing a neutral employer (LVCVA) to cease doing business with the primary employer. We accordingly reject the Charging Party's exceptions and motions.

[9] See, e.g., *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199, 199, 202–203 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007); *Teamsters Local 456 (Peckham Materials Corp.)*, 307 NLRB 612, 619 (1992); *Food & Commercial Workers Local 506 (Coors Distributing)*, 268 NLRB 475, 477–479 (1983).

[10] *Plumbers Local 32 v. NLRB*, 912 F.2d 1108, 1110-1111 (9th Cir. 1990); *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 555–558 (9th Cir. 1988).

[11] *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 430–432, 434–436 (D.C. Cir. 2007).

[12] Although we have found that ambiguity in employers' facially neutral work rules is not necessarily indicative of unlawful interference with employees' Sec. 7 rights, *Boeing Co.*, 365 NLRB No. 154 (2017), we view the ambiguity in unqualified threats to picket a common situs

threat to engage in lawful picketing must itself be lawful. See *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964) (threat to engage in lawful handbilling was itself lawful). But prohibiting unions from issuing an unqualified threat to engage in common situs picketing that may or may not be lawful does not infringe on a union's ability to make a clear threat to engage in lawful picketing. Indeed, the burden imposed on the threatening union is minimal. We do not expect unions to necessarily cite *Moore Dry Dock* or use any specific legalese. The union need only make clear in some manner that it will comply with legal limitations on common situs picketing so as to not entangle neutrals.

We believe, contrary to our dissenting colleague, that the Board's longstanding unqualified-threat rule strikes the only balance that will adequately protect neutrals as intended by Congress, and we respectfully continue to stand by it. We therefore affirm the judge's finding that the Respondent's unqualified threat to picket sent to neutral LVCVA violated Section 8(b)(4)(ii)(B).

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Unqualifiedly threatening to picket with the object of forcing The Las Vegas Convention and Visitors Authority to cease doing business with Desert Sun Enterprises Limited d/b/a Convention Technical Services.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices and all meeting halls within its jurisdiction copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to the Regional Director for Region 28 sufficient copies of the notice for posting by The Las Vegas Convention and Visitors Authority and by Desert Sun Enterprises Limited d/b/a Convention Technical Services, if willing, at all places where their notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 27, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The National Labor Relations Act makes clear that a union violates Section 8(b)(4)(ii)(B) only when it "threaten[s], coerce[s], or restrain[s]" a neutral employer. In this case, the majority finds a threat where there is none. Instead of applying the statute as it is plainly written and dismissing the complaint, my colleagues instead reaffirm a roundly—and rightly—criticized Board line of precedent holding that a union unlawfully threatens to picket a neutral employer simply because the union fails to comply with certain "formalistic rules" in its communications regarding a primary labor dispute.[1] As this case illustrates, such an approach contradicts the statute, ignores the realities of labor relations, and leads to unjust results. Under a faithful application of the statute, the

to be much different. There is no inherently coercive element in a facially neutral rule. Ambiguity as to its potential application only goes so far as to demonstrate that the rule *could* in certain circumstances interfere with Sec. 7 rights. On the other hand, an affirmative threat to apply economic pressure by picketing *is* facially coercive, and if not qualified, *would* necessarily coerce the neutral employer to which it is directed, in contravention of Congressional policy underlying Sec. 8(b)(4).

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 557 (9th Cir. 1988) (criticizing application of "formalistic rules" to govern communications in labor relations, where parties and context can drastically affect perceived meaning).

facts presented here simply do not establish an unlawful picketing threat, and Board precedent to the contrary should be overruled.

I.

In October 2013, IBEW Local 357 (Union) learned that an employer it was in a dispute with—Desert Sun Enterprises (Employer)—was performing work at the Las Vegas Convention Center. Thereafter, the Union sent a letter to the Southern Nevada Building and Construction Trades Council (Council)—another labor organization—stating that the Union was "requesting a strike sanction against [the Employer]. . . . for any and all jobs because of not paying area standards." The Union's letter was also courtesy-copied to certain members of the Board of Directors for the Las Vegas Convention and Visitors Authority (LVCVA), a neutral entity that was not involved in the dispute between the Union and the Employer. The LVCVA manages the Las Vegas Convention Center and other exhibition halls where the Employer performs some work.

The relevant question now before the Board is whether the LVCVA was threatened with picketing by the Union in violation of Section 8(b)(4)(ii)(B)—based entirely on a letter that was addressed to another entity, made no mention of the LVCVA in its body, and did not even include the word "picketing." Because the statutory language makes clear that to find a violation there must be threatening or coercive conduct, and because the evidence here fails to show that the LVCVA reasonably would have perceived a threat of picketing directed against it, there clearly was no violation here under any reasonable application of the Act.

As I now explain, Board precedent that would indicate a different result—based on the Union's failure to include a Board-required boilerplate recitation in its letter – is not supportable considering the plain language of the Act and the actual circumstances in which labor-relations communications occur.

II.

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union "to threaten, coerce, or restrain" a neutral entity with the object of causing the neutral to cease doing business with an employer that the union *is* engaged in a dispute with and which is the primary target of its picketing or other pressure. Because picketing a neutral entity is itself a form of unlawful pressure under Section 8(b)(4)(i)(B), when a union states its intent to picket a neutral, to urge it to cease doing business with the primary employer, this statement constitutes a threat in violation of Section 8(b)(4)(ii)(B).[2]

Board law has long held that whenever a union informs a neutral employer that it intends to picket a common situs (one at which both the neutral and primary employer do business), it must assure the neutral that any such picketing will satisfy the legal criteria, as set forth in the *Moore Dry Dock* decision, for ensuring that the picketing targets only the primary employer and not the neutral. See *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950) (finding presumption of lawful common situs picketing where such picketing is limited to times when primary employer is present and engaged in its normal business at the site, and where the picketing occurs close to the site and identifies that the dispute is with the primary employer). Failure to make those assurances results automatically in a violation of Section 8(b)(4)(ii)(B).

This rule, which before today the Board has never made any meaningful effort to justify, has faced significant federal-appellate court criticism, particularly by the District of Columbia and Ninth Circuits.[3] In agreement with those circuit courts, I would find that the Board's *Moore Dry Dock* assurances rule must be overruled as contrary to the Act. Indeed, it is long past time for the Board to come to grips with this reality.

III.

Congress carefully delineated the types of proscribed means for getting a neutral employer to cease doing business with a primary employer. A union may not "threaten, coerce, or restrain." The Act does not bar all conduct that might dissuade the neutral employer or even all conduct that conceivably could be interpreted as a threat; rather, by dint of Congress's chosen terms, to constitute a violation the union must communicate an intent to cause harm or engage in some other form of compulsion.[4] See *Black's Law Dictionary* (10th ed. 2014) (defining "coerce" as "to compel by force or threat"); id. (defining "threat" as "a communicated intent

[2] See, e.g., *Amalgamated Packinghouse*, 218 NLRB 853 (1975).

[3] See *Sheet Metal Workers' Int'l Assn., Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007); *NLRB v. Ironworkers Local 433*, supra.

[4] Undoubtedly, Sec. 8(b)(4) is intended to insulate neutral employers from pressure. The Supreme Court has found that Congress intended this section to sweep broadly with respect to the types of disputes from which neutrals should be insulated and has concluded that even political disputes were covered. See *Int'l Longshoremen's Assn. v. Allied Intl, Inc.*, 456 U.S. 212, 225 (1982). But Congress has specified, in no uncertain terms, the kinds of pressure against neutrals it has proscribed. And it has not been suggested that these proscribed forms of pressure—that is, in the case of Sec. 8(b)(4(ii)(B), "threats," "coercion," or "restraint"—should be interpreted more broadly than the ordinary meaning of these terms.

to inflict harm or loss on another or on another's property"); id. (defining "restraint" as "[c]onfinement, abridgment, or limitation . . . [p]rohibition of action"). As the Ninth Circuit has explained, "the mere failure of a union agent to invoke a particular incantation or to announce that picketing will be conducted in a lawful manner" is manifestly not a valid proxy for finding that the union's statement communicates an actual intent to harm the neutral.[5] Indeed, given the various ways a union might notify a neutral of common-situs picketing, and the wide range of settings in which such a statement might be made, only by considering the factual circumstances as a whole can we decide whether a statement might reasonably be found to threaten unlawful picketing.[6] Thus, "[t]he primary question is not whether particular words were used, or a disclaimer issued, but how, given the context of the conversation, the union's statements should reasonably be understood."[7] In sum, a union's mere failure to provide express assurances to a neutral employer is insufficient to establish a violation of the Act. Rather, the Board must examine all the relevant circumstances as a whole to determine whether the neutral employer would reasonably have concluded that it was being threatened with unlawful secondary picketing.

Taking that approach, rather than the Board's misconceived *Moore Dry Dock* assurances rule, this is an easy case. The Union's act of copying the LVCVA on its letter to the Council simply notified the LVCVA of a possible "strike sanction" against the primary employer's "jobs" and offered no additional detail as to the nature of possible picketing, nor mentioned the Convention Center as a target of any picketing.[8] Further, there is no evidence of past behavior by the Union vis-à-vis the LVCVA, or any other neutral employer, that would reasonably imply (or even remotely suggest) that picketing would be directed against the LVCVA. Without any further factual context to show why the neutral employer would have perceived the potential "strike sanction" here as a threat to target it with picketing, the Board should find that this vague letter is not a threat or otherwise coercive and thus does not violate Section 8(b)(4)(ii)(B).

IV.

The majority reaffirms the Board's per se rule that any statement by a union communicating an intent to picket in a common-situs situation, but lacking *Moore Dry Dock* assurances, violates Section 8(b)(4)(ii)(B). My colleagues attempt to overcome the obvious difficulty of such an approach—that is, how to find that the mere absence of certain assurances concerning the nature of prospective picketing will always and everywhere amount to the requisite "threat[s]" or "coerc[ion]"—by tautology: According to the majority, the absence of *Moore Dry Dock* assurances alone results in an "ambiguous threat" to picket a common situs, which will "inherently coerc[e]" neutral employers to cease doing business with the primary employer. But the notion that the absence of *Moore Dry Dock* assurances renders a statement inherently coercive does not withstand scrutiny.

The Board is frequently called upon to assess the coerciveness of a party's conduct, and in doing so, generally examines all the relevant circumstances. However, to be *inherently coercive*, an action must tend to have a compulsive effect under *any and all* circumstances.[9] There is no good reason to conclude that the absence of the *Moore Dry Dock* assurances will automatically tend to lead every neutral to perceive a threat of unlawful picketing in every union's communication, regardless of the content and context of the communication. The very idea that *any such notification* announcing prospective picketing at a common situs (regardless of how it is phrased) made *under any conditions* (regardless of the relationship or history between the parties) will tend to be viewed as a threat flies in the face of common sense. See *Ironworkers Local 433*, supra, 850 F.2d at 557 (10-year working relationship between union and employer representatives meant they would have "no difficulty in understanding each other" as to intended nature of any picketing). Indeed, a union representative who may not have a lawyerly facility with labor law will be unlikely to be objectively perceived as uttering a picketing threat simply because he or she failed to recite a proper legal formulation. See id. at 556 (in assessing whether unlawful picketing threat will be perceived, one must consider that parties may "not communicate in the carefully prepared, carefully couched legal formulae of lawyers").

Indeed, as the courts have found, in some cases it will be unambiguously clear that the union *does not* intend to target the neutral with its picketing, despite the lack of affirmative assurances regarding the nature of the picket-

[5] *NLRB v. Ironworkers Local 433*, supra, 850 F.2d at 557.

[6] See id. at 556 ("requirement that union representatives parrot particular words or phrases . . . is troublesome given the informal, non-legalized reality of day-to-day labor relations").

[7] Id. at 557.

[8] See *Ironworkers Local 433*, supra, 850 F.2d at 556 (reference to picketing "the job" would reasonably be understood to refer to picketing that targeted primary employer).

[9] Cf. *Miranda v. Arizona*, 384 U.S. 436, 457–458 (1966) (custodial police interrogation inherently coercive absent certain protective measures because "an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. . . . [and] [t]his atmosphere carries its own badge of intimidation. . . [in which] no statement obtained from the defendant can truly be the product of his free choice").

ing.[10] The fact that such cases exist alone gives the lie to the majority's conclusion that unqualified mentions of picketing are inherently coercive.[11]

And even to the extent that, in the absence of *Moore Dry Dock* assurances, there might sometimes be genuine uncertainty as to the nature of the picketing the union intends at the common situs, such uncertainty cannot properly be categorized as an "ambiguous threat," as my colleagues suggest. Rather, in those situations, it becomes *even more important* to examine all the circumstances to determine whether there has been a violation of the Act. To avoid making unlawful a forecast of picketing that the statute actually permits, one must make a careful determination of whether the union's statement established any reasonable basis for perceiving a threat of unlawful picketing.

Nor is there any merit to the majority's assertion that without *Moore Dry Dock* assurances, neutrals at a common situs will be instantly wary of a union's motives for sending a picketing notice to them and will likely cease doing business with the primary employer to avoid the perceived possibility of being subject to picketing pressure. A neutral's over-reaction does not make such a statement a threat if that statement is not objectively threatening. Moreover, even if some neutrals, in some circumstances, might reasonably perceive a threat in the absence of *Moore Dry Dock* assurances, such a situation is far from universal.[12] In many cases, the neutral will not perceive a threat, where, say, the union and employer have a long history of communicating over such matters, or where the words used, without mentioning the *Moore Dry Dock* criteria, make clear that the primary employer is being exclusively targeted.

That is not to say that the absence of *Moore Dry Dock* qualifications, combined with other circumstances, will never support an inference of a threat to picket a neutral employer. For example, where the facts as a whole—perhaps including evidence of prior unlawful picketing or other evidence that a union was attempting to imply, through vagueness, an intent to picket unlawfully—a threat may be found. But the point is that a finding of a violation must be made on a case-by-case basis, based on the reasonable interpretation of the entirety of the union's statement, in the context in which it is made.[13]

Instead of taking this opportunity to revise the Board's *Moore Dry Dock*-assurances doctrine in response to the thoughtful criticisms brought by both the courts of appeals and the General Counsel, my colleagues have failed to correct a rule that cannot be reconciled with the statute or with labor relations reality. Because the Act makes a threat, coercion, or restraint a necessary element of a Section 8(b)(4)(ii)(B) violation, the Board should dismiss the complaint here and should reverse misguided Board precedent that requires a contrary result.

Dated, Washington, D.C. December 27, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[10] See *Ironworkers Local 433*, supra, 850 F.2d at 556 ("It is apparent from the context of the entire conversation that … a reasonable employer would have so understood [that any picketing would target the primary employer]. In fact, the secondary employer, according to the testimony of its general manager, did understand that the union was threatening to picket [the primary employer].") By way of further example, in *Sheet Metal Workers' Intl Assn., Local 15 v. NLRB*, 491 F.3d 429, 431 (D.C. Cir. 2007), the union wrote to the neutral: "We understand that Energy Air [the primary employer] is performing HVAC mechanical work on [two] Beall's Department Store [the neutral employer] construction projects. . . . The union will be compelled to publicize our dispute with Energy Air by the way of leafleting, protesting and the possibility of picketing at the sites. If you have any questions I can be contacted at . . . ." The text of this missive focused on the union's interest in picketing *the primary employer*. Moreover, it invited questions from the neutral—not exactly the sort of thing a party intending to insinuate unlawful picketing would do. Accordingly, rejecting the Board's per se approach to notifications of common-situs picketing, the District of Columbia Circuit found that there was no threat of unlawful picketing. Id. at 436.

[11] Notably, Sec. 8(b)(4)(ii)(B) may not be interpreted to prohibit a statement that plainly expresses one's intention to engage in lawful picketing, because lawful picketing is itself protected. See *NLRB v. Servette, Inc.*, 377 U.S. 46, 57 (1964).

[12] The majority seems to assume that there could be no motives for a union's telling a neutral that it intends to picket a common situs other than to imply imminent picketing directed at the neutral. This is not so, as a union may legitimately wish to leverage a neutral employer's good will, or its desire to appear worker-friendly, by pointing out its labor dispute with a company the neutral works with or alongside, in the hopes that the neutral employer will voluntarily support the union's cause.

[13] Notably, in other contexts the courts have rejected the Board's imposition of per se rules in order for parties to be deemed in compliance with the Act where such rules go beyond what the statute itself proscribes. See, e.g., *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961) (where plain language of the Act unambiguously requires discrimination to make out a violation, Board may not impose per se rule requiring certain union hiring hall provisions where they do not necessarily support inference of discriminatory referrals).

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unqualifiedly threaten to picket with the object of forcing The Las Vegas Convention and Visitors Authority to cease doing business with Desert Sun Enterprises Limited d/b/a Convention Technical Services.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357, AFL–CIO

The Board's decision can be found at www.nlrb.gov/case/28-CC-115255 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Nathan Higley, Esq. and *Larry A. Smith, Esq.,* for the General Counsel.

Michael A. Urban, Esq. (The Urban Law Firm), for the Respondent.

Gregory E. Smith, Esq. and *Amy Baker, Esq. (Lionel Sawyer & Collins*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. This case was tried before me in Las Vegas, Nevada, on May 6, 2014. The captioned charge was filed on October 22, 2013, by Desert Sun Enterprises Limited d/b/a Convention Technical Services (Charging Party or Convention Technical Services), and an amended charge was filed by the Charging Party on January 14, 2014. On January 31, 2014, the Regional Director for Region 28 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO (Respondent or Union) of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Convention Technical Services has been a limited liability company with an office and place of business in Las Vegas, Nevada, engaged in furnishing portable electrical services in the convention industry. It annually purchases and receives at its Las Vegas facility goods and services valued in excess of $50,000 directly from points outside the State of Nevada. It is admitted and I find that at all times material herein Convention Technical Services has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act,

The Las Vegas Convention and Visitors Authority (the LVCVA) is a governmental entity that manages the Las Vegas Convention Center (LVCC) which includes common-situs exhibition halls where employees dispatched by the Respondent and other labor organizations perform work. The LVCVA annually purchases and receives at the LVCC facilities goods valued in excess of $50,000 directly from points outside the State of Nevada. It is admitted and I find that at all times material herein the LVCVA has been a person within the meaning of Section 2(1) and Section 8(b)(4) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Respondent is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether the Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act by the conduct of Respondent's business agent in advising the LVCVA that he, on behalf of the Respondent, was seeking strike sanction authorization from the Southern Nevada Building and Construction Trades Council against Convention Technical Services "for any and all jobs because of not paying area standards," without further advising the LVCCA that if a picket line was established at the LVCC the Respondent intended to comply with the standards set forth in *Sailors Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950).*

B. Facts and Analysis

At the outset of the hearing the General Counsel and Respondent entered into a Stipulation of Facts. The Stipulation of Facts, in pertinent part, is as follows:

On October 9, 2013, Max Carter, Assistant Business Manager

> of Respondent, reported to Al Davis, Business Manager and Financial Secretary of Respondent, that Employer [Convention Technical Services] was performing work on the ABC Kids Show at the LVCC. Davis told Carter to get a strike sanction against Employer for Employer's alleged failure to pay area standard wages and benefits.
>
> Also on October 9, Max Carter prepared the strike sanction request letter, Al Davis signed it, and Carter sent it to the Southern Nevada Building and Construction Trades Council. He also sent the letter to selected members of the Board of Directors for the LVCVA.
>
> Later the same day, October 9, 2013, the Trades Council sent its approval of a strike sanction against Employer to Carter.
>
> Respondent's strike sanction request letter and the Trades Council's approval of this request did not inform anyone that, if it established a picket line, it would comply with the standards contained in *Sailors Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950).*

The strike sanction request letter referred to above, on IBEW Local 357 letterhead and addressed to Darren Evans, Southern Nevada Building and Construction Trades Council, is as follows:

> Dear Darren,
>
> Please be advised that Local Union #357 of the International Brotherhood of electrical Workers is requesting a strike sanction against **Convention Technical Services.** This is for any and all jobs because of not paying area standards. (Original emphasis.)
> Your cooperation in this matter would be greatly appreciated.
> Sincerely,
> /s/ Al Davis
> Al Davis
> Business Manager/Financial Secretary
> IBEW Local #357
> cc. LVCVA Board Members

The foregoing Stipulation of the General Counsel and the Respondent constitutes an admission of each of the essential allegations of the complaint. Accordingly, upon receipt in evidence of the Stipulation, over the objection of the Charging Party,[1] the General Counsel moved for Summary Judgment. I verbally granted the General Counsel's motion on the record.

The purpose of the foregoing sequence of events was to place the issue directly before the Board in view of the fact that both the General Counsel and the Respondent believe that current Board law is no longer viable as a result of the refusal of the D.C. Circuit and the Ninth Circuit to enforce Board decisions requiring *Moore Dry Dock* assurances in similar circumstances.

The Board in *Sheet Metal Workers Local 15 (Brandon Regional Medical Center),* 346 NLRB 199, 202 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007), in agreement with the analysis of the administrative law judge, found that the union had violated the Act as a result of its failure to provide *Moore Dry Dock* assurances to a secondary employer under circumstances similar to those herein. While the Board discussed the matter in a different context, it summarized the current status and rationale of Board law on this issue, pertinent to the instant case, as follows, at page 199:

> The purpose of the Board's requirement that unions provide secondary employers with Moore Dry Dock assurances in connection with an announcement to picket a common situs is to assure the secondary that the picketing will be confined to the primary employer. *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 749–750, 752 (2004).

The D.C. Circuit rejected the Board's approach and denied enforcement of the Board's order. In doing so it took notice of the Ninth Circuit's earlier rejection of current Board law in this area and adopted the reasoning of the Ninth Circuit in *NLRB v. Ironworkers Local 433,* 850 F.2d 551 (9th Cir.1988). In that case the Ninth Circuit, in denying enforcement of a Board order under similar factual circumstances, stated that "there is still considerable merit to the general legal principal that people should be presumed to be acting lawfully until proven otherwise," and that there was "no justification for requiring [*Moore Dry Dock* assurances] in the absence of evidence that the union intends to picket in an unlawful manner or that its conduct or statements would reasonably be so understood." Id at 557. See also another Ninth Circuit case denying enforcement of a similar Board order: *Plumbers Local 32 v. NLRB*, 912 F.2d 1108 (9th Cir. 1990).

The briefs of the General Counsel and Respondent in support of a reversal of Board precedent and dismissal of the instant complaint are persuasive in setting forth legal and policy justifications for the dismissal of the complaint. However, as I am required to follow current Board law and as the General Counsel and Respondent will be submitting briefs to the Board on appeal, it is unnecessary to recount in this decision their arguments and legal and policy reasons favoring the adoption of circuit court precedent.

Accordingly, on the basis of the foregoing, and consistent with current Board law, I find that the Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the Act as alleged.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. The Respondent has violated Section 8(b)(4)(i) and

[1] The Charging Party refused to enter into the Stipulation and takes the position that the Stipulation is incomplete. Accordingly, the Charging Party sought to introduce additional evidence in support of its argument that the Respondent's conduct was unlawful and masked a secondary intent. The Charging Party's proposed evidence is summarized as follows: That the Charging Party had a collective-bargaining agreement with another union; that the Regional Office's investigation of the charge was inadequate; and that as a result of the strike sanction request letter sent by the Respondent to the LVCVA board members "the strike threat caused a group of [the Charging Party's] employees to be taken from the show floor and replaced by other employees from the Respondent." I denied the Charging Party's request to present such evidence.

(ii)(B) of the Act as alleged.

REMEDY

Having found that the Respondent has violated Section (b)(4)(i) and (ii)(B) of the Act, I shall recommend that it be ordered to cease and desist from such violation and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[2]

The Respondent, International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Unqualifiedly threatening to picket with the object of forcing The Las Vegas Convention and Visitors Authority, or any other employer to cease doing business with Desert Son Enterprises Limited d/b/a Convention Technical Services.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices and meeting halls within its jurisdiction copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees/members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 22, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 28, 2014

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, coerce, or restrain The Las Vegas Convention and Visitors Authority where an object thereof is to force or require The Las Vegas Convention and Visitors Authority to cease doing business with Desert Son Enterprises Limited d/b/a Convention Technical Services or any other person.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CC-115255 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."