**Service Employees International Union, Local 525, AFL–CIO; Service Employees International Union, AFL–CIO, CLC *and* General Maintenance Service Company, Inc.**

**Service Employees International Union, Local 525, AFL–CIO; Service Employees International Union, AFL–CIO, CLC *and* Lerner Enterprises Limited Partnership, Theodore N. Lerner, Mark D. Lerner, Albert Abramson and Gary Abramson, d/b/a Washington Square Limited Partnership *and* The Lenkin Company Management, Inc.** Cases 5–CB–6558, 5–CB–6584, 5–CB–6712 (1,2), 5–CC–1118 (1,2), 5–CC–1119, and 5–CC–1120

September 30, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On November 6, 1992, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel filed exceptions, the Charging Parties filed cross-exceptions, the Respondents filed an answering brief,[1] and the Charging Parties filed a reply brief.[2] The Respondents filed exceptions, the General Counsel filed an answering brief, and the Respondents filed a reply brief. The Respondents filed a motion to dismiss or, alternatively, for leave to adduce new evidence. The Charging Parties filed an opposition brief.

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

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,[3] and conclusions[4] as modified below, to adopt the recommended Order as modified, and to issue a new notice.[5]

1. For the reasons stated by the judge, we agree that the Respondents did not violate Section 8(b)(1)(A) on April 4, 1990,[6] by allegedly attempting to impede a General Maintenance employee from crossing their picket line.[7] We similarly agree that the Respondents did not violate Section 8(b)(1)(A) or (4): by their October 25 (noontime), 26, and 29 rallies outside the Washington Square building; or by organizer Kevin Brown's comments during their October 25 after-work rally. We further agree with the judge that the Respondents did not violate Section 8(b)(4) by: (a) their October 19 visit to Washington Square offices; (b) their November 2 demonstration outside 2301 M Street, N.W.; or (c) their November 6 distribution of flyers at the Bethesda, Maryland headquarters of The Lenkin Company Management, Inc.[8]

2. For the reasons stated by the judge, we agree that the Respondents violated Section 8(b)(1)(A), (4)(i), and (ii)(B) by: (a) their October 31 picketing of the PMI-managed garage in Washington Square; (b) the November 1 "trashing" incidents at Washington Square, 1130 Connecticut Avenue, N.W., and 1133 Connecticut Avenue, N.W.;[9] and (c) the November 8 "handcuffing" incident at Washington Square. We further agree that the Respondents violated Section 8(b)(4)(i) and (ii)(B) by

[1] The General Counsel filed a motion to strike certain portions of the Respondents' answering brief, and the Respondents filed a brief opposing this motion. We deny the General Counsel's motion to strike.

[2] The Respondents also filed a motion to strike the Charging Parties' cross-exceptions, and the Charging Parties filed a brief in opposition to the motion to strike. We deny the Respondents' motion.

We similarly deny the Respondents' motion to dismiss or, alternatively, for leave to adduce new evidence regarding the appropriate remedy.

[3] The General Counsel and the Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. VI,C, of her decision, the judge finds that the Respondents engaged in secondary activity at the White Flint Shopping Mall and at the Indian Springs Athletic Club. As no unlawful conduct is alleged to have occurred at these locations, we do not adopt these findings.

[4] The judge, contrary to her analysis and findings, found in her proposed conclusions of law that the Respondents violated Sec. 8(b)(1)(A) on November 1, 1990, when their trash bag hit a Washington Square patron. We have deleted this finding. We further find that the November 8, 1990 "handcuffing" incident outside Washington Square is included in the November 7 to 14, 1990 picketing found violative of Sec. 8(b)(4)(i) and (ii)((B).

[5] We have substituted a new Order and notice, reflecting all of the violations found, and tailoring the judge's recommended 8(b)(4)(i) and (ii)(B) remedy to language the Board has followed in other similar cases. See, e.g., *Sheet Metal Workers Local 19 (Delcard Associates),* 316 NLRB 426, 439 (1995), modified on other grounds 154 F.3d 137 (3d Cir. 1998).

Also, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center,* 321 NLRB 144 (1996).

[6] All dates are in 1990 unless noted.

[7] Although the judge incorrectly stated that General Maintenance employee Selene McCullough did not testify that Union Representative Paul Scully touched her as she attempted to cross the picket line, we find that this error does not affect our conclusion.

In dismissing this 8(b)(1)(A) allegation, we do not rely on *Musicians Local 76 (Jimmy Wakely Show),* 202 NLRB 620 (1973).

[8] Contrary to dissenting Member Brame, Member Hurtgen finds nothing in the conduct of the Respondents' supporters, when delivering a sealed envelope at the Washington Square offices of Property Manager Sandra Reed on October 19, that had the "reasonably foreseeable effect" of threatening, coercing, or restraining Washington Square or its property manager within the meaning of Sec. 8(b)(4)(ii)(B). Further, to the extent that Member Brame relies on the Respondents' 8(b)(4)(B) conduct at other locations to support this allegation, Member Hurtgen notes that those violations postdate the October 19 incident. Additionally, as to the November 2 incident outside 2301 M Street, and the November 6 incident at Lenkins' headquarters, he agrees with the judge that they fall within the ambit of permissible activity under *Edward J. DeBartolo Corp. v. Florida Coast Building Trades Council,* 485 U.S. 568 (1988).

[9] We adopt the judge's finding, however, that the Respondents did not violate Sec. 8(b)(1)(A) by assaulting a Washington Square patron with a trash bag. There is no evidence that any employee observed this assault.

picketing the Monument-managed parking garage at 1701 L Street, N.W., on November 2 and by picketing Washington Square on the evening of October 25.[10]

3. We further find that the Respondents violated Section 8(b)(4)(i) and (ii)(B) by: (a) picketing the Washington Square building on the evenings of November 7 to 14;[11] (b) demonstrating at the Aspen Hill Racquet Club on November 8; (c) their November 15 conduct in the law offices of Arent, Fox; and (d) the November 1, 14, and 16 demonstrations outside the homes of Albert and Ronald Abramson.[12] For the reasons stated by the judge, we find that this conduct violated Section 8(b)(4)(B)[13] because it was directed at secondary parties (Washington Square Limited Partnership and its partners Lerner and Abramson; The Lenkin Company Management, Inc.; and the law firm of Arent, Fox, Kintner, Plotkin & Kahn (Arent, Fox)), with whom the Respondents had no labor dispute. In this regard, we find no merit to the Respondents' claims that Charging Parties Lenkin and WSLP (or their principals), or Arent, Fox, forfeited their neutrality by engaging in a joint venture with primary employers USSI or Red Coats—through the Apartment and Office Building Association (AOBA) or otherwise—to oppose unionization of the primaries' janitorial employees. Nor do we agree with our dissenting colleague that, by their action, the Charging Parties essentially became parties to the labor dispute and thus lost their neutrality as to that dispute. Rather, we agree with the judge that the Respondents unlawfully sought to enmesh these neutral individuals and entities in its dispute with Red Coats and USSI.

When enacting Section 8(b)(4)(B) in 1947, Congress sought to shield neutrals from labor disputes that were not their own, on the basis that, inter alia, neutrals were often powerless to comply with the union's demands. *Carpet Layers Local 419 v. NLRB,* 467 F.2d 392 (D.C. Cir. 1972).[14] When seeking to establish that an entity has lost its neutrality for purposes of Section 8(b)(4)(B), a union bears the heavy burden of demonstrating that loss.[15] *Sheet Metal Workers Local 80 (Limbach Co.),* 305 NLRB 312, 314 fn. 5 (1991), enfd. in relevant part 989 F.2d 515 (D.C. Cir. 1993); *Newspaper & Mail Deliverers (Gannett Co.),* 271 NLRB 60, 67 (1984). This burden is satisfied only where the union establishes that the entity is so closely identified with, and allied to, the primary that it has ceased being neutral to the dispute. *Teamsters Local 456 (Carvel Corp.),* 273 NLRB 516, 519 (1984). As found by the judge, unions can satisfy this burden by establishing that the targeted entity is an "ally" of the

[10] We simply reject dissenting Member Liebman's conclusion that none of the Respondents' conduct is violative of Sec. 8(b)(4)(i)(B). Thus, an express inducement of employees to strike is not a necessary predicate to a finding that they were induced or encouraged by a union to withhold their services from the targeted employers particularly where, as here, that was the foreseeable consequence of the Respondents' conduct. Cf. *Warshawsky & Co. v. NLRB,* 182 F.3d 948 (D.C. Cir. 1999).

Contrary to the comments of our dissenting colleague, we do not suggest that all 8(b)(4)(ii) conduct will necessarily be 8(b)(4)(i) conduct. For example, if a union threatens a neutral, and there are no employees who hear or observe the threat, it could not be said that the union was seeking to induce or encourage employees to do anything. However, the Unions' conduct here was open and notorious and a foreseeable consequence of it was to appeal to employees to withhold their services.

[11] The General Counsel has excepted to the judge's failure to find that the Respondents' picketing outside Washington Square from October 30 to November 7, and on November 15, additionally violated Sec. 8(b)(4). We reject this exception. As to the picketing from October 30 to November 7, we note that the General Counsel stipulated, and the judge found, that the picket signs were not in issue during this period. Indeed, it was not until November 7 that the Respondents were notified that the hours of USSI employees had been changed so that they would not be working during the early evening hours when the picketing occurred. As to the November 15 picketing, although the record demonstrates that noontime picketing occurred prior to the Respondents' supporters entering the Washington Square offices of Arent, Fox, the judge made no specific findings as to that picketing. In any event, as any finding of an additional 8(b)(4)(B) violation would be cumulative, and would not affect the Order, we find it unnecessary to resolve the issue as to the November 15 picketing.

[12] Clearly, the Abramsons were neutrals. Thus, it is difficult to see how their private homes could be primary sites. Equally clear, the Unions' conduct at the homes was not a peaceful handbill appeal of the kind privileged by *DeBartolo,* supra.

[13] Sec. 8(b)(4) provides that it is unlawful for a labor organization or its agents:

> (4)(i) to engage in, or to induce or encourage an individual employed by any person engaged in commerce or in a industry affecting commerce to engage in, a strike or a 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*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

[14] In 1951 amendments, Congress reaffirmed a union's right to engage in strikes and picketing against primary employers. Thus, when considering 8(b)(4)(B) allegations, the Board is mindful of "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council,* 341 U.S. 675, 692 (1951).

[15] Our dissenting colleague apparently seeks to shift or lessen the union's clear burden of demonstrating loss of neutrality by analogizing this area of the law to one concerning single employer and alter egos. We find this argument wholly unpersuasive and note that it ignores Congress' clear purpose when enacting 8(b)(4) of shielding neutrals from outside disputes.

In our view, the General Counsel meets his burden of proof on this issue by showing that the union has directed 8(b)(4) conduct to an ostensibly neutral company. The union may defend by showing that this company is an ally of the primary or has otherwise enmeshed itself in the primary dispute. The union bears the burden of proof as to this issue.

primary employer. Under this doctrine, where the union establishes that the entity is a "single employer" with the primary, or performs the primary's struck work, it is deemed an "ally" of the primary that has forfeited its neutrality for purposes of Section 8(b)(4)(B). See, e.g., *Mine Workers (Boich Mining Co.),* 301 NLRB 872, 873 (1991), enf. denied on other grounds 955 F.2d 431 (6 Cir. 1992); *Office Employees Local 2 (Postal Workers),* 253 NLRB 1208, 1211 (1981).[16] Similarly, as found by the judge, where it is demonstrated that the targeted entity exercises substantial, actual, and active control over the working conditions of the primary's employees, that entity may be found to have relinquished its 8(b)(4)(B) protections. See generally *Electrical Workers IBEW 2208 (Simplex Wire)*, 285 NLRB 834, 838 (1987).

We agree with the judge and our dissenting colleague that Charging Parties WSLP and Lenkin Company, are not "allies" of the primary employers Red Coats or USSI.[17] Indeed, the Respondents concede that the "ally" doctrine is not established here. We also agree with the judge and our dissenting colleague that the Charging Parties do not substantially control the working conditions of the primaries' employees. See generally *Carpet, Layers Local 419 v. NLRB,* supra; Cf. *Carpenters (Missoula White Pine Sash),* 301 NLRB 410 fn. 3 (1991). Accordingly, under extant law, the judge correctly concluded that the Charging Parties remain "neutrals." Through the conduct described in Section 3(a)–(d) above, the Respondents unlawfully sought to enmesh these neutrals in the primary dispute between Respondents and USSI-Red Coats. This conduct was unlawful because it was "tactically calculated to satisfy [the Respondents'] objectives elsewhere," i.e., to organize the primary employers' employees. *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 644 (1967).

Our dissenting colleague, however, leaves existing law behind and creates a new doctrine that would deny the Charging Parties the protection of Section 8(b)(4)(B). Our colleague notes that the Charging Parties chose to participate in a trade association, AOBA, and that AOBA, in turn, assisted members who were primaries in the dispute to resist the union campaign while also assisting members who were neutral secondaries to shield them from the impact of the union activity. From this, she concludes that the Charging Parties became so entwined in the union campaign that they became parties to the dispute, even though they do not fit within any of the definitions in existing Board law which would render them primary as opposed to secondary employers.[18]

We find no legal support for this position.[19] Indeed, as recognized by the judge, the flaw in this argument is that it erroneously assumes that "wholly unconcerned" means that neutrals must be totally disengaged from a labor dispute to retain their neutrality.[20] That is not the law.[21] Fox example, a customer may want a supplier to resist union demands for a substantial wage increase. The customer may be concerned that such a wage increase will result in a price increase to the customer. Thus, the customer is not "wholly unconcerned" as to the supplier-

[16] In evaluating "ally" status, the Board examines various factors, including common ownership, common control of labor relations, integration of operations, and the dependence of one employer on the other for a substantial portion of its business. *Graphic Arts Local 262 (London Press),* 208 NLRB 37, 39 (1973).

[17] We further agree with the judge that the Charging Parties and Arent, Fox are not joint employers with USSI and Red Coats.

[18] Our dissenting colleague makes much of *Edward J. DeBartolo Corp. v. Florida Coast Building Trades Council*, supra, in which the Supreme Court cautioned that Sec. 8(b)(4) must be construed narrowly because its potential to reach "expressive" activity by unions implicates the First Amendment. However, *DeBartolo* does not deal with the issue of primaries vs. neutrals. Rather, it deals with the issue of whether conduct addressed to a conceded neutral was unlawful. In any event, as to that issue, the Court in *DeBartolo* expressly distinguished the peaceful handbilling present in that case—which it found to be "expressive" and lawful—from activity such as "violence, picketing, or patrolling" (485 U.S. at 577) which it found to be a combination of conduct and communication more likely to be found coercive under the Act. The conduct which we find, in agreement with the judge, violated Sec. 8(b)(4) clearly exceeds the bounds of merely expressive conduct; accordingly, the admonitions of *DeBartolo* do not come into play.

See also *Warshawsky & Co. v. NLRB,* supra (distinguished *DeBartolo* on the grounds that there the conduct sought by the union was a *lawful* boycott whereas, in contrast, in *Warshawsky* constitutional problems were not presented due to the *unlawful* inducement of employees to engage in a secondary strike).

[19] We concur with the judge's finding that the Respondents might have successfully defended against 8(b)(4)(B) violations had they adduced convincing proof that the Charging Parties, through AOBA or otherwise, were so involved in, or exercised such actual and active control over the management policies and/or labor relations of the primaries as to become enmeshed in the latters' dispute with the SEIU. This they failed to do.

Further, we adhere to the well-settled proposition that, absent employment controls not present here, a building owner is a person separate and apart from the janitorial contractor. See, e.g., *Southern California Gas Co.,* 302 NLRB 456, 461–462 (1991); *Service Employees Local 87 (Pacific Telephone),* 279 NLRB 168, 171–172 (1986). Concededly, the owner may have an economic interest in keeping the janitorial contractors' employees nonunion. Thus, in a lay sense, the owner may not be "wholly unconcerned" about the prospect of unionization. However, in agreement with the judge and the D.C. Circuit, we find that this phrase, as applied to Sec. 8(b)(4)(B) was not intended to have so broad a reach. See *Carpet, Layers Local 419 v. NLRB,* 429 F.2d 247 (D.C. 1970); on remand 190 NLRB 143 (1971); enfd. 467 F.2d 392 (D.C. Cir. 1972).

[20] We disagree with our colleague's claim that we have taken undue liberties with the ordinary meaning of "neutral." The term is not used in its "ordinary" context in these cases—but in its precise legal meaning as defined in case law, supra. As she concedes, the term "neutral" does not appear in Sec. 8(b)(4), but derives from Senator Taft's use of the phrase "wholly unconcerned" when sponsoring that legislation. Further, we agree with the judge that the term "wholly unconcerned," as used by Senator Taft during the enactment of that provision, cannot be given the construction urged by the dissent. Extant law makes clear that absent an "ally" relationship or substantial control by the neutral over the primary, neutrality will not be lost.

[21] We do not find that our dissenting colleague's, "common sense" analysis of this case suffices to shield secondary conduct where legal precedent would not.

union bargaining dispute. But, that does not permit the union to picket the customer.

Further, to the extent that the Charging Parties were interested parties in the Respondents' janitorial contractors' labor dispute, it was largely because the Respondents overtly and expressly sought to enmesh them in it. From the 1987 inception of their "Justice for Janitors" (JFJ) campaign, the Respondents sought to enmesh the Charging Parties and other building owners and managers in their dispute with USSI, Red Coats, and other janitorial contractors. The JFJ campaign in the District of Columbia was part of a nationwide campaign to organize janitors who clean commercial buildings. Throughout this campaign, Respondents' leaders consistently requested meetings with neutral building owners and managers as well as the primary cleaning contractors. And, from the beginning, the Respondents made clear their intent to convince the building owners and managers to use their influence with the contractors to persuade the latter to recognize the Respondents. In response to the Respondents' planned strategy to encompass building owners in their campaign to organize janitorial employees, the Charging Parties lawfully sought to protect their companies and business interests. They were clearly entitled to do so. See generally *Painters Local 36 (Stewart Construction),* 278 NLRB 1012 (1986).[22] That they did so under the auspices of the AOBA—of which they were members—did not forfeit those protections.

Nor did the fact that the AOBA provided information, training, and legal advice to its primary and neutral members impermissibly enmesh the Charging Parties. First, as found by the judge, the Charging Parties availed themselves of these AOBA services in order to protect *their* business interests apart from any immediate interest in the primary labor dispute.[23] Second, the AOBA, as a trade association, was entitled to assist all of its members and also to take a point of view on the Respondents' activities which were dramatically affecting many of its members, both secondaries and primaries alike. Moreover, the AOBA was clearly entitled to advise members consistent with what it viewed as the best interests of the organization as a whole. Ultimately, as our dissenting colleague must concede, each member was a separate entity with complete control over its own labor relations and was free to follow advice dispensed by the AOBA or to decline to do so. The fact that principals of the Charging Parties were active in AOBA governance at the time of the Respondents' campaign may have made them more attractive targets for the Respondents' aggressive tactics, but that fact cannot convert them from neutral to primary status in the dispute.

Additionally, despite some early AOBA rhetoric (to the effect that it was "spearheading" the campaign against unionization),[24] there is no evidence that the AOBA—on behalf of the neutrals—engaged in actual conduct which enmeshed the Charging Parties in the primary dispute. As found by the judge, the record is barren of evidence that the AOBA provided a forum in which the Charging Parties plotted to interfere with Respondents' efforts to organize janitors. Indeed, as stated by the judge, the evidence falls far short of establishing that the Charging Parties—through the AOBA—were "so involved in, or exercised such actual and active control over the management policies and/or labor relations of the primary employers as to become enmeshed in the janitorial contractors' labor dispute with the [Respondents]." We also agree with the judge that the fact that the Charging Parties (and other AOBA-building owners) contributed to and benefited from a legal defense fund to which primary members also contributed does not establish that the Charging Parties lost their neutral status. This is particularly true because the evidence demonstrates that much of the legal advice provided by the AOBA was for the purpose of ensuring, not forfeiting, the Charging Parties' neutrality.[25] That the primary employers as AOBA members also received legal advice paid for by the AOBA fund, cannot thus transform the Charging Parties from neutral to primary employers.

Our dissenting colleague makes much of the fact that AOBA opposed the Unions' attempts to gain recognition from the primaries, albeit she recognizes that AOBA also opposed the Unions' efforts to enmesh the neutrals. Of course, AOBA did both because AOBA was comprised of primary and neutral companies. However, it does not follow that each member of AOBA thereby became a primary. The neutrals used AOBA to preserve their neutrality, and the primaries used AOBA to oppose the Unions' efforts to gain recognition. In our view, a neutral company does not sacrifice its neutrality simply because it belongs to an organization that acts on behalf of neutrals and primaries.

Nor does it follow that a neutral company sacrifices neutrality simply because one of its principals is an officer of an association that has primary and neutral mem-

[22] Further, even had the record established that the Respondents' organization of the primaries' employees would have economic consequences on the Charging Parties, this would have been insufficient to destroy secondary status. See, e.g., *Carpet Layers, Local 410 v. NLRB,* supra, 467 F.2d at 401.

[23] See generally *Service Employees Local 32B-32J (Dalton Schools),* 248 NLRB 1067, 1069 (1980) (No precedent is advanced to support the view that a neutral's efforts, however fruitless, to seek relief from a union and get out from under unlawful picketing somehow aligns the neutral with the primary so as to justify picketing the former.).

[24] As found by the judge, by late 1988 and early 1989—well before the late 1990 conduct here at issue—the AOBA modified its rhetoric to make clear that its neutral members who did not employ janitors (such as the Charging Parties) "[took] no position as to whether or not there should be a union for any given contract cleaning company."

[25] As found by the judge, the "barring letters" prepared by AOBA for and used by the Charging Parties as well as other secondary and primary members do not warrant a contrary result inasmuch as they were used as defensive measures against the Respondents' extension of picketing and other demonstrations to their facilities.

bers. There are, of course, many trade associations in this country, and business owners and executives often participate in those associations. However, those owners and executives also run their own companies. The companies determine their own policies, which may or may not reflect association policy. Notwithstanding this, our colleague asserts that the position taken by an association somehow becomes ascribable to the companies which comprise it. In our view, this assertion is erroneous as a matter of law and policy. There is no precedent to support it. And the consequences of it would be that persons would be loathe to join or lead associations, for fear of the enmeshment of their companies in disputes with unions.

Further, we find no support for her apparent view that a law firm's representation of a primary means that the law firm itself becomes a primary. This view is at war with established legal principles. Just as a lawyer can represent an unpopular person without being tainted by association, so too can a labor lawyer render legal advice to an employer without, in effect, becoming that employer. A contrary view would mean that every law firm that gives advice to a client involved in a labor dispute becomes a party to that labor dispute. We are aware of no precedent that would support such a rule of law and certainly find no compelling reason to craft one in this case.

Accordingly, and for the reasons more fully explicated by the judge, we find that the Respondents failed to establish that the Charging Parties and Arent, Fox lost their neutrality. Therefore, we find that the Respondents violated Section 8(b)(4)(B) as set forth above.

4. Finally, contrary to the judge, we find that the Respondents violated Section 8(b)(1)(A) through the April 4 comments of its organizer, Eric Cauthern, to operating engineer Stephen Dixon at 2100 M Street, N.W.[26]

On April 4, during the Respondents' demonstration outside 2100 M Street, which is managed by the Charles E. Smith Company and cleaned by Charging Party General Maintenance, building engineer Dixon placed a hand on Cauthern's shoulder. Cauthern responded by telling Dixon to "[g]et the fuck out of his face," and soon after asked Dixon when he got off work and promised to return to "kick his ass."

The judge found that Cauthern's comments, while rude and intemperate, were not unlawful because Dixon was not connected to the primary employer and because his comments were not overheard by or communicated to employees. We disagree. Initially, we note that Dixon is a "building engineer" (an employee) rather than a "building manager" as found by the judge. Further, we find that Cauthern's comments would reasonably tend to restrain or coerce employee Dixon in violation of the Act. See generally *Meat Packers (Hormel & Co.),* 291 NLRB 390, 394 (1988); *Maywood Plant of Grede Plastics,* 235 NLRB 363, 380 (1978), enfd. in relevant part 628 F.2d 1 (D.C. Cir. 1980). Accordingly, we reverse the judge and find that the Respondent violated Section 8(b)(1)(A).

[26] Unless otherwise specified, all cited addresses are in Washington, D.C.

## AMENDED REMEDY

Having found that the Respondents have violated Section 8(b)(1)(A), (i), and (ii)(B), as set forth in sections 2, 3 and 4 of this decision, by coercing employees in the exercise of their Section 7 rights and by enmeshing Washington Square Limited Partnership, The Lenkin Company Management, Inc., PMI, Monument Parking, Arent, Fox, and other neutrals in the primary labor dispute, we order that that they cease and desist from such practices and take affirmative action designed to effectuate the Act.

## ORDER

The National Labor Relations Board orders that the Respondents, Service Employees International Union, AFL–CIO, CLC, and Service Employees International Union Local 525, AFL–CIO, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging employees of Washington Square Limited Partnership, The Lenkin Company Management, Inc., Arent, Fox, Kinter, Plotkin & Kahn, PMI, Monument Parking, or any other person engaged in commerce or in any industry affecting commerce, to refuse in the course of their employment to perform any services where an object is to force or require any person to cease doing business with United States Service Industries (USSI) or Red Coats, or to require USSI or Red Coats to recognize or bargain with them.

(b) Threatening, coercing, or restraining Washington Square Limited Partnership, The Lenkin Company Management, Inc., Arent, Fox, Kinter, Plotkin & Kahn, PMI, Monument Parking, or any other person where an object is to force or require them to cease doing business with USSI or Red Coats, or to require USSI or Red Coats to recognize or bargain with them.

(c) Blocking or impeding access to the Washington Square situs.

(d) Assaulting supervisors and tenants of neutral employers.

(e) Threatening employees with bodily harm when they seek to halt demonstrations.

(f) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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 office and at all meeting halls in Washington,

D.C., copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondents 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 sufficient copies of the notice for posting by Washington Square Limited Partnership, The Lenkin Company Management, Inc., Arent, Fox, PMI, and Monument Parking, if they are willing, at all places where their notices to the public and patrons customarily are posted.

(c) 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 at testing to the steps that the Respondents have taken to comply.

MEMBER HURTGEN, concurring.

As set forth by the administrative law judge, and as highlighted in the majority opinion, I find that the Respondents failed to establish that the Charging Parties and Arent, Fox forfeited their neutrality for purposes of Section 8(b)(4)(B).

I agree that, under extant legal principles (i.e., the "ally" doctrine), those parties remained neutrals whom the Respondents unlawfully sought to enmesh in their dispute with the primary janitorial contractors USSI and Red Coats. Further, even if neutrality can also be lost where the "neutral" exercises substantial, actual, and active control over the working conditions of the primary employees, that control was not established here.

I write separately to acknowledge there may be other situations in which I might be willing to find that neutrality has been lost. That is, if a neutral company furnishes advice, money, or other material assistance to a primary employer, in connection with the primary employer's dispute with a union, it is at least possible that the neutral company thereby forfeits its neutrality.[1] However, assuming arguendo that this is so, I would find that the Charging Parties and Arent, Fox remained neutrals. In reaching this conclusion, I rely particularly on the following rationale.

First, the fact that companies exercise their 8(c) privilege to express their opposition to the unionization of other companies does not destroy the neutrality of the former companies. Second, the neutral AOBA members took their positions in response to the Respondents' effort *to enmesh them* in the effort to unionize the primaries. The Respondents' goal was articulated from the inception of their 1987 "Justice for Janitors" campaign. It was to pressure the persons perceived to have the most clout (the neutral building owners and managers) in order to achieve unionization of the primaries' employees. Clearly, resistance to a union effort to enmesh neutrals cannot itself be a factor that destroys neutrality. Third, by early 1989, the neutrals had made it clear that their sole interest was to protect their own property and business interests against trespass and intrusion by the Unions, as distinguished from assisting the primaries in their resistance to unionization.[2] The union conduct involved herein occurred in 1990 and later. Thus, after the neutrals made it crystal clear that they were indeed neutral on the issue of unionization of primaries, the Respondents persisted in their efforts to enmesh them in that dispute.

Accordingly, in addition to the majority rationale (which I adopt), I find that the circumstances of this case provide no basis for expanding extant law to find that the Charging Parties and Arent, Fox lost their neutrality.

MEMBER LIEBMAN, dissenting in part.

In finding today that the Charging Parties are "neutral" employers in the labor dispute arising from the Justice for Janitors Campaign, my colleagues have taken liberties with the "ordinary meaning of plain language." I agree with my colleagues and the administrative law judge that the Charging Parties are neither "allies" nor a single employer with the maintenance contractors, Red Coats and USSI, under traditional Board law. However, I would find under the particular circumstances outlined below that, by their choice to actively support and participate, through the Apartment and Office Building Association (AOBA), in the campaign to thwart the Unions' attempt to organize and represent the employees of Red Coats and USSI, the Charging Parties forfeited their "neutrality" in the labor dispute and the protection afforded by 8(b)(4) to neutral employers.[1] Although dis-

[27] If this Order is enforced by a judgment of the 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] I do not include in this rationale the prospect that a neutral law firm would lose its neutrality by virtue of giving advice to a primary. In my view, that position would be contrary to principles which require an attorney to give advice to a client, irrespective of whether the attorney personally agrees with the goals of the client.

[2] The "barring" letter, devised by AOBA to protect against trespass by the Respondents, was quite consistent with the neutrals' efforts to protect their property interests.

[1] For separate reasons set forth below, I additionally find that the Unions' actions with regard to the law firm, Arent, Fox, Kinter, Plotkin & Kahn, did not violate Sec. 8(b)(4).

Because I find that the record adequately supports the Respondents' claim that the Charging Parties were not "neutrals" for purposes of this proceeding, and because I find that their conduct directed toward Arent, Fox was not unlawful, I need not pass on the judge's "attorney-client privilege" rulings.

tinct from USSI and Red Coats in other respects, by their own conduct the Charging Parties obscured the boundaries between themselves and the maintenance contractors in the very arena that is pivotal to assessing their neutrality in this case, namely, the labor dispute between the Unions and the two contractors. Thus, while the Charging Parties may have been able, in some instances, to limit the Unions' activities or exclude them from their property on other grounds not at issue in this case, I find that they could not circumscribe the Unions' activity on the grounds that it was secondary rather than primary conduct under Section 8(b)(4).

Accordingly, contrary to my colleagues, except for the picketing of the PMI and Monument parking garages, discussed in Section 2 of the decision, I would not find that the Respondent Unions have violated Section 8(b)(4)(i) and (ii) (B) of the Act.[2]

## Relevant Facts[3]

The Service Employees International Union initiated a "Justice for Janitors" campaign to organize janitors nationwide in 1987. This case involves the campaign in the District of Columbia. The Unions announced that they would seek to persuade real estate owners and managers to exert their influence on the cleaning contractors to recognize the Unions as bargaining representatives of the contractors' janitors. The Unions engaged in various activities, including contacting members of AOBA, a trade association consisting of hundreds of Washington, D.C. area building owners, managers, and maintenance contractors. As to some cleaning contractor members, the Unions demanded voluntary recognition.

In response to the "Justice for Janitors" campaign, the AOBA developed a structured, funded program to counter the Unions' organizational campaign. At all relevant times, the Charging Parties,[4] the law firm Arent, Fox, United States Service Industries (USSI), and Red Coats were AOBA members. Indeed, from 1987 through 1990 Edward Lenkin, an officer in Charging Party Lenkin Company Management, Inc., was a member of the AOBA executive committee and its board of directors. During 1989, Edward Lenkin was AOBA's president. Similarly, Mark Lerner, managing partner of the Lerner Corporation—a limited partner in Charging Party WSLP, was a member of the AOBA's board from 1988 through 1990.[5] Throughout the relevant period, the Arent, Fox firm was retained by the AOBA as counsel in matters related to the Unions' Justice for Janitors campaign. AOBA has a paid administrative staff which implements policies formulated by the executive committee and board of directors.

AOBA's program to counter the Justice for Janitors campaign had its genesis in a September 1987 meeting of member building owners and large cleaning contractors—including key officers of the Lenkin and Lerner companies. The meeting was convened for the precise purpose of "formulat[ing] a strategy to counter the Union's efforts." The AOBA members—including the Charging Parties—unanimously agreed to commit AOBA staff and resources to fight the Unions' attempts to unionize employees of area custodial contractors. The members also agreed to develop a special taskforce to deal specifically with the Unions' campaign. The taskforce met on October 1, discussed and agreed that the AOBA was well suited to deal with the "Justice for Janitors" campaign, and stated that if this was "not properly and troughly [sic] undertaken now [it] will have severe negative financial effects on all [Washington,] D.C. properties both immediately and for years to come."

In late 1987, various building owners and managers reported to AOBA's executive vice president, Donald Slatton, that the Unions had contacted them asserting that the developers had de facto control over local janitors' working conditions. AOBA's board of directors then met to discuss the organizing drive and consider whether AOBA would take a lead role in countering the Unions' organizing campaign. At that meeting, AOBA's board, including representatives from the Charging Parties, unanimously agreed to assume "a lead role in the campaign," by resolving to: (1) devote staff time; (2) employ Arent, Fox attorney, Allen Siegel, as lead management labor attorney; and (3) commit its funds in order to "counter the attempt to unionize service employees in Washington." As the judge found, the board of directors thereby "authorized AOBA to assume a leading role in orchestrating activities in opposition to the Justice for Janitors campaign."

Thereafter, the AOBA funded its campaign against the Unions by soliciting contributions from members—owners, building managers, and cleaning contractors alike, specifically for the campaign. AOBA president in 1989, Edward Lenkin, who solicited these contributions, was also Charging Party Lenkin Company's president.

In soliciting contributions to the fund, the AOBA made clear to its members that the purpose of the funds was to help the AOBA, on behalf of its members, spearhead the "industry effort to fight the union on all levels." For ex-

[2] I agree with Member Hurtgen, for the reasons set forth in the majority opinion (fn. 8), that the following three incidents were protected by *DeBartolo* (*Edward J. DeBartolo Corp. v. Florida Coast Building Trades Council,* 485 U.S. 568 (1988)): the October 19 delivery to the property manager at the Washington Square Office; the November 2 incident outside 2301 M Street, and the November 6 incident at Lenkins' headquarters.

[3] The facts are more fully set forth in the judge's decision.

[4] Although the Washington Square Limited Partnership (WSLP) was not a separate AOBA member, both principals of this limited partnership, Albert and Ronald Abramson, were.

[5] In addition, James Schneider, an official of Tower Construction—a company owned by WSLP's Abramson family—was on the AOBA Board from 1987 to 1990.

ample, in a June 1988 solicitation of contributions, the AOBA wrote its members that the requested funds were necessary to "help finance our efforts to resist an intensive campaign to unionize the employees of our city's cleaning contractors." Further, the AOBA did not merely solicit donations from its members, but sent them written invoices, specifying the precise amount to be contributed, and making clear that the requested money was to "fund AOBA's plan to counter the SEIU's organizational campaign."[6]

Significantly, the record does not show that the solicited contributions were earmarked by AOBA either for use on behalf of its janitorial contractor members in their efforts to counter the organizing drive, or for separate use on behalf of its building owner and manager-members to shield themselves from the union campaign[7] or to aid them in expressing their views about it. On the contrary, some solicitations, which were addressed to "all AOBA building owners and operators," made clear that the moneys were to "fund the industry effort to fight the Union on all levels." Significantly, in response to AOBA's solicitations, the Charging Parties as well as the contractors, Red Coats and USSI, regularly contributed to the fund.

As the self-proclaimed leader of the campaign against the Unions, the AOBA actively monitored the "Justice for Janitors" campaign. It directed its members to apprise it of any "overt union activity among [their] janitorial personnel," and of any activities by the Unions at their buildings. Throughout the relevant period, AOBA served as a clearinghouse for gathering and disseminating information to its members on the Unions' organizational activities.

The AOBA also conducted general training seminars for its members—including the Charging Parties and primaries—on "practical strategies . . . to deal with the Union's tactics," and on concrete steps to be taken when such tactics occurred on their premises. Further, in response to specific activities by the Unions, the AOBA counseled its members as to precise actions that should be taken. For example, in a November 1987 newsletter, AOBA's lawyer, Siegel, instructed that members should "[r]efuse to accept any documents from the union, such as authorization cards." Siegel further wrote that, when faced with a demand for voluntary recognition, members should use specific provided language declining that request.[8]

AOBA's involvement was not limited to providing members with training, advice, or general guidelines. AOBA directly involved itself—on behalf of all of its members—in all aspects of the antiunion campaign. For example, AOBA, acting in an apparently representative capacity, regularly met with the Unions to discuss and handle various aspects of the labor dispute. AOBA also used the solicited legal defense fund to pay for the defense of its members against alleged unfair labor practices and other legal actions instituted by the Unions, and assisted in the prosecution of a member's unfair labor practice charges against the Unions.

AOBA also directly designed and determined the strategies members should use in responding to the Unions' organizational campaign. For example, as cited above, the AOBA advised its members as to precisely what to say and do if confronted by the Unions' demand for voluntary recognition. Similarly, in May 1988, after meeting with police, the AOBA told its members what steps they should take if the Unions' demonstrators came on their property. Significantly, AOBA did not merely tell members what their options were in responding to the union activity or how to go about implementing a particular response. For example, in addition to advising members how to refuse recognition in an "Alert" memorandum to cleaning contractor members, AOBA stressed, "it is *very important* that you *decline recognition.*" (Emphasis in the original.) Thus, AOBA's function was as much directive as educational.

In June 1988, following increased demonstrations by the Unions at members' commercial buildings, the AOBA issued a form "barring" letter to its members. This form, which the AOBA urged each member to personalize and immediately send to the Unions by certified mail, notified the Unions that any individuals affiliated with them were barred from the member's property for any purpose related to the "Justice for Janitors" campaign. The AOBA "barring" letter further stated that entry on the member's property for such a purpose constituted criminal trespass.

After some members sent the "barring" letter to the Unions, the AOBA again wrote its members, proclaiming the letter's success: "those companies that have sent the [barring] letter have experienced no union activity." The AOBA then urged its remaining members to send copies to the Unions. Significantly, the Charging Parties, the cleaning contractors, and other members, heeded the AOBA's directive and mailed "barring" letters to the Unions.

[6] In some of the later requests for contributions, the AOBA became more circumspect in its rhetoric, claiming that "AOBA's members who own and/or manage real property do not employ janitors and therefore take no position as to whether or not there should be a union for any given cleaning contractor. It is the philosophy of AOBA's active members that such a decision should be made, as is lawfully prescribed under the NLRA, by the employees of those contractors."

[7] Indeed, the Respondents' allegedly secondary activity did not begin until substantially after the AOBA task force and defense fund had been formed and the AOBA had become active in the antiunion campaign.

[8] In a November 1998 "Special Alert" memo, AOBA gave its cleaning contractor members a similar directive against voluntarily recognizing the Respondents, or taking any actions that could be construed as such recognition.

After the Unions filed unfair labor practice charges against AOBA and its members, claiming that the "barring" letters were unlawful overly broad no-solicitation rules,[9] the AOBA likewise directed *all* of its members to send the police and the Unions a clarifying letter. This November 1988 clarification stated that the "barring" notice was not meant to prevent employees of the janitorial contractors from engaging in union solicitation as permitted under Section 7 of the Act.

Significantly, when sending the form clarification letter to its members, the AOBA wrote that it "strongly recommends and urges you to send a copy . . . to the Union immediately, as full and complete resolution of the outstanding charges." AOBA directed that its members send courtesy copies of the modified "barring" letter to it and Arent, Fox.[10] Again, the Charging Parties, along with many other members, heeded AOBA's directive. Moreover, with respect to its advice on union solicitation and the "barring" letters, the AOBA did not distinguish among its members based on whether they were primarily or secondarily involved in the labor dispute.

The AOBA continued to direct the campaign, on behalf of its members, against the Unions' organizing drive. The AOBA served as a clearinghouse for information, offered members advice and strategies, provided members with updates at each AOBA meeting, and solicited funds for the AOBA legal defense fund. Moreover, throughout the relevant period, AOBA continued to emphasize to its members that AOBA was responsible for formulating their response to the Unions' organizing attempts.[11] Significantly, the Charging Parties followed AOBA's advice and recommended actions.

In addition to spearheading the effort, on behalf of its members, to oppose the Unions' organizing campaign, the AOBA consistently claimed direct credit for the success of its efforts. Thus, when soliciting funds from members for the AOBA-SEIU fund in October 1988, the AOBA wrote that "due to the cooperation, involvement, and financial support of the building owners/managers and building maintenance companies" it was able to fend off the Unions' tactics. Later, in a memo to members highlighting its major accomplishments for 1988, the AOBA's first pronouncement was that it "lead the office building industry's fight to prevent the Service Employee's [sic] International Union from organizing the janitorial workers in the District." Similarly, when attempting to dissuade an AOBA member from leaving the organization, AOBA President Edward Lenkin, a principal in Charging Party Lenkin Company, wrote that:

> I would especially like to point out [AOBA's] efforts to prevent the Service Employees International Union from imposing union membership on the janitorial personnel employed by building maintenance contractors.
>
> . . . .
>
> AOBA has been the focal point of the opposition and, to date, the SEIU has been completely unsuccessful.

And, when informing members of its major accomplishments in 1989, the AOBA's opening declaration touted its "continued . . . lead [in] the office building industry's campaign to prevent union membership from being forced upon janitorial workers without a federally supervised election."[12]

Finally, throughout the period that it spearheaded the campaign against the Unions' efforts to organize the contractors' employees, the AOBA was on notice that the Unions considered it the agent for all AOBA members for purposes of that campaign. As early as January 1988, the Unions wrote the AOBA's executive director stating that when they had attempted to discuss the organizing campaign with building owner and manager members, they were referred instead to the AOBA. The Unions wrote that this led them to believe that the AOBA "ha[d] responsibility and authority to resolve matters." Similarly, after the AOBA directed its members to send the "barring" letters, the Unions wrote to AOBA and its members, warning that they were jeopardizing any claim that owner-members were neutrals in the labor dispute. The Unions also asserted that the AOBA's barring policy and defense fund "flies in the face of any claim of owner neutrality." And, in response to the barring letters, the unfair labor practice charges filed by the Unions named AOBA and Arent, Fox as well as the Charging Parties.[13] Moreover, the record does not reveal any persuasive evidence that AOBA attempted to disavow its representative role.

## Legal Background

The precise definition of a "neutral" employer under the secondary boycott provisions of the Act has been the subject of considerable and often passionate debate. This

[9] The Respondents filed a complaint in District of Columbia Superior Court claiming that the "barring" letters violated the city's Human Right's Act.

[10] Interestingly, AOBA expressly directed that these copies not be noted on the letters sent to the Respondents.

[11] For example, in a March 1990 solicitation of funds, the AOBA informed its members that as their "chartered representative . . . . AOBA is empowered to assert the position taken by its members on an issue."

[12] At some point in 1989, the AOBA attempted to modify its rhetoric by claiming that it, on behalf of its members, opposed recognition of the Respondents only in the absence of National Labor Relations Board conducted elections, rather than its earlier stated opposition to any union representation. I do not regard this change as significant. The relevant fact is that the Charging Parties enmeshed themselves in the primary dispute by—through AOBA directed activities—actively collaborating with contractor members USSI and Red Coats in their dispute with the Unions.

[13] The Respondents also initiated suit against the AOBA, among others, alleging that the barring notice violated the District's Human Rights Act. AOBA's legal defense fund was used to pay for its defense.

debate has long been informed by the Supreme Court's formulation of the policies underlying 8(b)(4),[14] namely, "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[15] Additionally, the Supreme Court has warned in *Edward J. DeBartolo Corp*.[16] that because application of 8(b)(4) addresses "expressive activity," it bears the risk of implicating the First Amendment. Hence the provisions must be construed narrowly in order to avoid running afoul of that Constitutional Amendment. *DeBartolo* reminds us that unions no less than employers and individuals have rights under the First Amendment and that while a union's right to communicate its message may be abridged under the Act, the First Amendment requires that the Board do so with great caution.[17]

On its face, the legislative history of these provisions would seem to be relatively clear and similarly argue for an extremely narrow interpretation of the term "neutral." Section 8(b)(4)(B) itself makes no reference to "neutral" employer. Rather, the "term derives from the remarks of Senator Taft, sponsor of the provision, describing its purpose." [18] Senator Taft stated:

> 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 an employer and his employees. . . . [U]nder the common law, a secondary boycott was unlawful. . . . [B]ut under the provisions of the Norris-Laguardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been under common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.[19]

Later, Senator Taft expanded on these remarks:

> The secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike… It is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer.[20]

According to Senator Taft then, the legislation which he sponsored was intended to, in effect, codify the common law as to secondary boycotts insofar as it shields employers "wholly unconcerned" with a labor dispute but not employers "in cahoots with or acting as the primary employer." Further, in defining the scope of secondary boycotts under common law, the Board and courts, including the Supreme Court, have frequently relied on a quote from Judge Learned Hand: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it."[21]

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[14] Sec. 8(b)(4) provides that:

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

[15] *NLRB v. Denver Building Trades Council,* 341 U.S. 675, 692 (1951).

[16] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council,* 485 U.S. 568, 576 (1988).

[17] I would additionally note that under other provisions of the Act, a finding that two entities are *sufficiently related* to be a single employer or alter egos results in *extending liability* for unfair labor practices to additional entities. Hence, consistent with the Government's burden of proving violations of the Act, the threshold is high and the Board is generally reluctant to find that two entities are so related. In contrast, under 8(b)(4), a finding that an employer is *insufficiently related* to the primary dispute to forfeit its neutrality results in shielding that entity from what would otherwise be lawful activity under the Act and in *assessing liability* for an unfair labor practice against a union. Accordingly, again consistent with the overall burden carried by the Government to prove unlawful acts, in this context the Board must recognize a lower threshold for relatedness and use restraint in affirmatively finding neutral status.

[18] *Carpet Layers Local 419 v. NLRB,* 429 F.2d 747, 750 (D.C. Cir. 1970). This case was reconsidered by the Board on remand at 190 NLRB 143 (1971), and subsequently enforced at 467 F.2d 392 (D.C. Cir 1972), as referenced, infra.

[19] 93 Cong.Rec. 4198, II Legislative History of the Labor-Management Relations Acts 1106 (1947).

[20] 95 Cong.Rec. 8709 (1949).

[21] *Electrical Workers IBEW v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), affd. 341 U.S. 694 (1951). See *Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 388 (1969). In *Production Workers of Chicago & Vicinity Local 707 v. NLRB,* 793 F.2d 323, 329–330 (D.C. Cir. 1986), the Court elaborated on the history of the interpretation of these provisions:

> In *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675 (1951), the Court recognized that the original language of the provision would bar virtually all union involvement in picketing, even that specifically protected by other provisions of the Act. The Court therefore looked instead to the purposes of the provision, observing that the section is "often referred to in the Act's legislative history as one of the Act's 'secondary boycott sections'" and . . . described the policy behind this prohibition as "shielding unoffending employers from pressures in controversies not their own." [Citation omitted.]
> . . . .

As clear as the legislative intent may appear, however, its boundaries have proven elusive and the years have consequently produced much additional gloss which has had the effect of taking the term "neutral" employer some steps away from the manifest meaning of the legislative history.[22] Recognizing that a union would be unlikely to attempt to enlist the support of an employer unless the employer had some sort of relationship with the primary,[23] the Board and courts have frequently held that, Senator Taft notwithstanding, a neutral employer need not be "wholly unconcerned." Thus, for example, the Board and courts have stressed that Senator Taft's reference to employers who are "wholly unconcerned" does not preclude employers who have a strong economic interest in the outcome of a labor dispute from claiming neutral status.[24]

In order to separate those employers whose economic interest is insufficient to negate their neutral status from others whose common interest with the primary requires such a forfeiture, the Board and courts have utilized the related "single employer" and "ally" doctrines. Although the two doctrines are sometimes used interchangeably in this context, for the most part the single-employer doctrine considers whether the two entities are engaged in a single enterprise and focuses on the question of control. Thus, the Board looks to four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common or centralized control of labor relations.[25] The ally doctrine, on the other hand, was devised to address situations where the two entities are structurally separate but where the second entity has, in effect, injected itself into the labor dispute by, for example, performing struck work.[26]

Analysis

Turning to the facts of this case, it is significant that, at the direction of its members, the AOBA developed and actively spearheaded the campaign to fight, on all levels, the Unions' efforts to organize the maintenance contractors' employees. As discussed above, the AOBA vigorously undertook this campaign. The AOBA secured Arent, Fox as counsel, solicited membership contributions expressly earmarked for both offensive and defensive actions against the Unions, monitored the Unions' organizing activities and strategies, and repeatedly advised and instructed its members how to act with regard to the Unions. The AOBA members authorized Arent, Fox and the AOBA to act on their behalf to thwart the Unions' campaign to organize USSI and Red Coats employees. Arent, Fox represented the AOBA and also individual members, without distinguishing between USSI and Red Coats, which employed the employees that the union sought to represent, and other member-employers. Moreover, advice and direction from the AOBA and Arent, Fox addressed the specifics of how members should handle the admittedly primary activity, such as requests for recognition directed at the maintenance contractors, as well as how to handle the purportedly secondary activity. The Charging Parties regularly contributed to the AOBA-SEIU legal defense fund and, most significantly, helped shape AOBA's campaign against the organizing effort through the leadership and direct participation of Charging Party principals, particularly Lenkin and Lerner who served as AOBA officers or directors.

I agree with the judge and my colleagues in the majority that there appear to be no grounds for finding any of the Charging Parties to be a single employer with the maintenance contractors whose employees the Unions were attempting to organize. Likewise, the Charging Parties are distinguishable from those employers who have previously been found to be primaries under the ally doctrine. However, these doctrines are "merely tools that must be used to reflect the full range of congressional policies underlying the primary-secondary dichotomy," [27] and these policies must inform our evaluation of the facts even where these facts may not fall neatly into any categories or labels established by Board precedent.

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In the 1959 Landrum-Griffin Act, the Congress then sitting gave its implicit imprimatur to the Supreme Court's interpretation by inserting the proviso of present Section 8(b)(4) that explicitly protects primary activity. Since that time, as in the years before, the caselaw has universally and unambiguously held that Congress intended Section 8(b)(4) to protect only neutral parties—not even all neutrals—from coercion in disputes not their own. [Citations omitted.]

[22] As Justice Harlan recognized,

> "No cosmic principles announce the existence of secondary conduct, condemn it as evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of 'secondary' conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating 'primary' from 'secondary' activities." [*Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. at 386–387.]

[23] *NLRB v. Electrial Workers IBEW Local 3,* 542 F.2d 860, 865 (2d Cir. 1976).

[24] See, e.g., *NLRB v. Electrical Workers IBEW Local 3,* supra, and *Carpet, Layers Local 419 v. NLRB*, supra, 467 F.2d at 401 ("the mere presence of some economic interdependence between the two will not automatically cause one to lose its secondary boycott protection with respect to labor disputes of the other. The appropriate result must depend upon the particular facts of each case").

[25] See, e.g., *Mine Workers (Boich Mining Co.),* 301 NLRB 872, 873 (1991).

[26] *Carpet Layers Local 419 v. NLRB*, supra, 429 F.2d at 753.

[27] *Curtin Matheson Scientific, Inc.,* 248 NLRB 1212, 1214 (1980). Indeed, the courts have cautioned the Board that "the question of neutrality cannot be answered by the application of a set of verbal formulae. . . . Rather the issue can only be resolved by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer up against the intent of the Congress as expressed by the Act to protect employers who are 'wholly unconcerned' and not involved in the labor dispute between the primary employer and the union." *Vulcan Materials Co. v. Steelworkers,* 430 F.2d 446, 451 (5th Cir. 1970), cert. denied 401 U.S. 963 (1971).

In my view "a common sense evaluation"[28] of the unique facts of this case establishes that, through their sponsorship, support, and active participation in AOBA, the Charging Parties engaged in conduct which made them, in effect, parties to the labor dispute and thus, by their own actions, have forfeited any neutral status. Far from "wholly unconcerned" with the labor dispute between the Unions and the cleaning contractors, the Charging Parties were indeed deeply involved in it.

In concluding that the Charging Parties relinquished their neutrality, I do not imply that, to maintain neutrality, they were required to disengage themselves totally from the primary labor dispute. Third parties like the Charging Parties may share a primary employer's philosophical opposition to union efforts to organize the latter's employees and they are entitled to express that opposition. Similarly, as set forth above, the precedent is clear that the economic interdependence which usually exists between a primary and a third party who does business with the primary does not necessarily foreclose neutrality and, in itself, would not be sufficient to in this case. It is also foreseeable that third parties may retain legal representation to protect their interests in a labor dispute and they are fully entitled to do so. In none of these situations is neutrality necessarily compromised.[29]

Moreover, I agree with my colleagues in the majority that under Board precedent an employer does not compromise its neutral status by attempting to shield itself from picketing. [30] However, contrary to my colleagues, the actions of the Charging Parties, through the AOBA, went far beyond taking defensive measures to protect their specific interests in a labor dispute. As set forth above, the Charging Parties were not merely passive dues paying members of the AOBA who took no role in the antiunion campaign. Nor were the AOBA's activities only directed at informing members and protecting building owners and managers from the primary labor dispute. Rather, the Charging Parties, through the AOBA and its attorneys, directly supported and helped finance the maintenance contractors' antiunion campaign and themselves blurred the boundaries between the primary and potentially secondary activity.[31]

In sum, competing policies underlying the Act may well explain the gloss on the legislative history which says, in effect, that, to be deemed a neutral, an employer need not be in fact "neutral" in all respects. However, it is one thing to say that an employer may remain neutral though it has a strong economic interest in the outcome of a dispute, or that it should be able to express its views about a labor dispute not its own as it insulates itself from it. It is quite another to say, as my colleagues in the majority do here, that an employer may essentially take on the primary's cause as its own but still insulate itself from primary activity by claiming a formulaic adherence to neutrality.[32] In so concluding, my colleagues do not clarify the meaning of the term "neutral." They turn it on its head, thereby eliminating any semblance of a connection between the gloss, the ordinary meaning of the term and the legislative history of the secondary boycott provisions.[33] This willingness to abandon the ordinary meaning of "neutral" is particularly troubling since, as

[28] *NLRB v. Teamsters Local 810,* 460 F.2d 1, 6 (2d Cir. 1972) ("Neutrality, for purposes of the Act, is not a technical concept. To determine whether an employer is neutral involves a common sense evaluation of the relationship between the two employers who are being picketed.").

[29] The cases cited by the judge are distinguishable. For example, in *Carpet Layers Local 419 (Sears) v. NLRB,* 429 F.2d 747 (D.C. Cir. 1970), on remand 190 NLRB 143 (1971), enfd. 467 F.2d 392 (D.C. Cir 1972), there was mere economic interdependence between the primary and secondary employers. Similarly, in *Service Employees Local 32B–32J (Dalton Schools),* 248 NLRB 1067 (1980), there was no evidence that the primary and secondary employers collaborated together to oppose union representation. Indeed, in none of the cases cited by the judge is there evidence that, as here, the purported neutrals combined with the admitted primary employers to formulate and carry out a labor relations policy aimed at preventing the latters' unionization.

[30] *Service Employees Local 32B–32J (Dalton Schools),* 248 NLRB at 1069.

[31] I would emphasize that in finding that the Charging Parties here have forfeited their neutral status, I am not finding that somehow all of AOBA's policies and actions are "ascribable" to all of its members. Thus, relying on the particular facts of this case, I am addressing only the status of the Charging Parties here, and not other AOBA members and I am referring only to the conduct at issue here, namely the active support of the primaries' antiunion campaign. This support, as noted above, was far more than just moral support since it included financial help coupled with a well orchestrated campaign involving both offensive and defensive actions by AOBA members. Most significantly, in concluding that the Charging Parties were not neutrals under the Act, I am not finding them liable for any actions of the organization AOBA or any of its members. Rather, I am merely finding that they could not insulate themselves from the collateral consequences of a labor dispute they have chosen to join. In short, at issue here is not their liability but the Unions.'

[32] Contrary to the judge, in evaluating whether the Charging Parties lost their neutrality, I do not find it determinative whether their conduct was protected or unlawful. To say that the Charging Parties could lawfully assist the maintenance contractors in their antiunion campaign does not require a conclusion that they may then insulate themselves from unwanted aspects of the very labor dispute which they have chosen to join. Rather, the significant consideration is whether those claiming neutrality have sufficiently isolated themselves from the primary dispute or, as here, have become inextricably intertwined with it.

[33] Of interest in this regard is the Supreme Court's decision *in Tennessee Valley Authority v. Hill,* 437 U.S. 153, 173–174 (1978). There, the Court held that the Endangered Species Act of 1973 prohibited completion of a dam in order to preserve the habitat of the previously obscure snail darter even though millions of dollars had already been appropriated to build it. Justice Burger, writing for the majority, rejected arguments by the Authority and the dissenters that Congress could not rationally have intended the draconian result that would be required under the "ordinary meaning of [the] plain language" of the statute. In doing so, Justice Burger relied on "Lewis Carroll's class advice on the construction of language: 'When I use a word,' Humpty Dumpty said, in rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' *Through the Looking Glass, in the Complete Works of Lewis Carroll* 196 (1939)." Justice Burger then added, "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." Id. at 194.

set forth above, the Supreme Court has cautioned in *DeBartolo* that Section 8(b)(4) is to be construed narrowly.

There remains the question of whether the law firm, Arent, Fox, should be deemed a neutral employer in this labor dispute. The Unions argue, in effect, that by actually joining the AOBA, actively assisting the AOBA in its campaign against the Unions' attempt to organize janitorial employees, and representing both contractors and building owner/managers alike, the law firm eroded the lines between lawyer and client and primary and secondary, thus forfeiting its status as a neutral in the dispute. I need not reach this argument, however, in finding that the Unions' visit to the Arent, Fox offices was not unlawful. I would simply observe that whatever else Arent, Fox may have been doing with respect to the labor dispute,[34] it admittedly was the legal representative of Red Coats, one of the two undisputed primaries in this case. Accordingly, to the extent that the demonstrators were attempting to communicate with one of the primary's attorneys (concededly one of their purposes in visiting the law firm's offices), the attorney must be considered an agent of a primary, and thus an attempt to communicate with him cannot be considered anything but primary. In that respect, the attorney stands in the shoes of its client.

To the extent that the demonstrators were attempting to distribute handbills to the law firm's employees describing their dispute with the primary employers, such communication is clearly not unlawful under *DeBartolo*, supra. The judge found that the Respondents lost the protection of *DeBartolo* because, in her view, they were engaged in a "purposeful attempt to disrupt the lawyers, administrative staff and clients so as to enmesh the firm in the primary dispute." I assume that the handbilling effort was unwelcome, disruptive, and perhaps "purposefully" so. But, I disagree with the judge that the conduct therefore ceased to be privileged publicity or rose to the level of unlawful inducement or coercion within the proscriptions of Section 8(b)(4). Likewise, even if the conduct was arguably trespassory, that does not convert it into Section 8(b)(4) proscribed activity. For these reasons, I would reverse the judge's conclusion that the Respondents violated Section 8(b)(4)(i) and (ii)(B) by their conduct at the offices of Arent, Fox.

Having concluded that the Unions' conduct toward the Charging Parties was within the bounds of lawful primary activity, I can find no basis in law or precedent for distinguishing the Unions' activity at the Aspen Hill Racquet Club or at the homes of the Abramsons from the other primary activity. Certainly, it has been long established that, subject to the requirements of *Moore Dry Dock,*[35] a union may follow the primary employer wherever the union finds it. Indeed, in this context the Board has been admonished that it is not to substitute its judgment as to the "propriety and adequacy" of a union's attempts to persuade for an analysis of whether the conduct is secondary or lawful primary activity.[36]

Specifically focusing on the Racquet Club, the record shows that the Lenkin family had both a prime ownership interest in the Racquet Club and owned the Lenkin Management Company, one of the Charging Parties in this case. Additionally of interest, Edward Lenkin was on the AOBA executive committee from 1987 through 1990, serving as commerical vice president, president-elect, president, and past-president during the years when the AOBA formulated and implemented its campaign against the Unions. In these circumstances, the Racquet Club must be found to be a primary situs for purposes of the labor dispute at issue here.

With respect to the Abramsons, as set forth above, Charging Party WSLP and its Washington Square building were a principle focus of much of the Union activity. WSLP was composed of two families, the Abramsons and Lerners. Albert Abramson was the managing member of the WSLP partnership. His son, Gary, was also a member of this partnership and Abramson family members comprise the Tower Construction Company which develops and manages real estate. Along with the Lerners, the Abramsons additionally jointly own a large shopping center and have ownership interests in many other properties in Washington and surrounding suburbs. Mark Lerner was on the AOBA board from 1988 through 1990 and Tower Official James Schneider was on the Board from 1987 through 1990, again the relevant time period for this case.

In finding that the Abramsons' homes are primary sites, I am mindful certainly that the Supreme Court has found that municipalities may restrict certain types of picketing at private residences.[37] However compelling the Supreme Court's discussion of the municipality's interest in protecting residential privacy may be, I can find no basis in the Supreme Court's decision, the Act or Board precedent for inserting this interest into our analysis of Section 8(b)(4), much less making it the controlling factor in a determination of whether conduct is lawful primary activity. Accordingly, I must conclude that the Abramsons' homes took on the primary character of their many business locations. Under the facts of this

[34] The actual extent of the law firm's role is unclear because much of the evidence that might have been pertinent to this question was excluded from the record under the attorney-client privilege.

[35] 92 NLRB 547 (1950) (insulating secondary employers and employees at a common situs from a primary labor dispute).

[36] See, e.g., *NLRB v. Teamsters Local 968,* 225 F.2d 205, 209–210 (5th Cir. 1955) ("no warrant exists either in the language of the statute or the authorities cited . . . for empowering the Board, under the guise of fact-finding, to fix the situs of the dispute at only one of the primary employer's numerous business activities").

[37] *Frisby v. Schultz,* 487 U.S. 474 (1988).

case, I see no basis under Section 8(b)(4) upon which to differentiate between a primary's home or office.

Conceivably, the Charging Parties or Arent, Fox could have excluded the union representatives or limited their activities on other grounds. For example, it may well have been true that some of the union activity here, though primary, was trespassory and, under appropriate circumstances, might have been lawfully circumscribed by the employers in another forum. But, these possibilities for recourse elsewhere do not make the conduct a violation of Section 8(b)(4). Likewise, merely because otherwise primary conduct may offend its audience certainly does not make it secondary.

As a final note, I must add that even were I to agree with my colleagues that the conduct at issue here is secondary, I could not agree with them that it is violative of Section 8(b)(4)(i) as well as (4)(ii).[38] Thus, the record evidence is persuasive that the Unions' appeal was directed specifically, emphatically and exclusively at the Charging Party employers and not at their employees. Moreover, unlike *Warshawsky & Co. v. NLRB,*[39] in which the Circuit Court for the District of Columbia reversed a Board finding that the Union had *not* violated Section 8(b)(4)(i), there is no evidence in the record here from which even to infer that the Unions had a secret agenda which they communicated to employees and to which the employees responded by walking off the job. Rather, the most that can be shown here is that some employees were incidentally affected, primarily when distracted by either observing or dealing with the consequences of the Union activity. If that is the criteria, however, then virtually all conduct which violates 8(b)(4)(ii) will necessarily be found to have also violated 8(b)(4)(i) as long as any employees are exposed to it. I simply cannot agree that that is what was intended by the framers of these provisions.

In light of all of the foregoing, I respectfully dissent. Accordingly, except for the Unions' picketing of the PMI and Monument parking garages, discussed in section 2 of the decision, I would dismiss all allegations that they violated Section 8(b)(4).[40]

MEMBER BRAME, dissenting in part.

I write separately regarding three specific incidents. As set forth by the administrative law judge and in the majority opinion, the Charging Parties and the law firm, Arent Fox, were neutrals protected from the coercive activities of the Respondents by Section 8(b)(4)(B). No recognized exception in law or precedent would exclude these entities, which exercise no control over the working conditions of the primary employees, from the protection afforded by the Act. Accordingly, the secondary object of the Respondents' activity directed toward the Charging Parties and Arent, Fox is established. Numerous incidents of such secondary conduct are found today to be coercive and unlawful. Contrary to the judge and my colleagues, there are three additional incidents in which the Respondents' secondary activity was coercive and, consequently, should be found to be unlawful as alleged by the General Counsel.

I.

On October 19, 1990,[1] six of the Respondents' supporters visited the property management office of Washington Square which was cleaned by USSI, a primary contractor. Their ostensible purpose was to deliver a letter to Reed, the building manager. The receptionist told them that Reed was not in the office and, upon recognizing the Justice for Janitors (JFJ) logo on the letter's envelope, that she would check with Reed's assistant, Kan Cooke. She requested that they wait in the reception area. Instead they followed her into Cooke's office. En route, she requested several times that they return to the reception area but they did not do so. Cooke would not accept the letter and asked the six individuals to leave. After their spokesman placed the unopened letter on Cooke's desk, they all departed.

In finding that this incident was not unlawful, the judge noted the receptionist's testimony to the effect that Respondents' delegation had been civil and that their conduct did not differ from that of routine courier services. The judge also relied on the failure of the delegation to request that either the receptionist or Cooke withhold their services and the fact that the contents of the letter were not coercive.

Once, as here, the secondary nature of the conduct of union supporters is established, then the Board must look to the nature and foreseeable consequences of pressure exerted to assess whether the conduct is coercive and therefore unlawful under Section 8(b)(4).[2] Moreover, coercive activity with a secondary object is unlawful under Section 8(b)(4) whether or not the actual coercive effect is great or relatively small.[3]

It is evident from the receptionist's swift response to the JFJ logo that she was well aware of the campaign that was being waged by the Respondents and that her em-

[38] I also question whether all of the conduct found unlawful under Section 8(b)(4)(ii) is unlawful under *DeBartolo,* but I find it unnecessary to lengthen my dissent by parsing that question here.

[39] 182 F.3d 948 (D.C. Cir. 1999), granting petition for review of 325 NLRB No. 141 (1998).

[40] I also do not agree with my colleagues that the Respondents violated Sec. 8(a)(1) based on organizer Cauthern's April 4, 1990 conduct toward employee Dixon at 2100 M Street. Rather, I agree with the judge that Cauthern's comments would not reasonably restrain or coerce Dixon. *Service Employees Local 87 (Pacific Telephone),* 279 NLRB 168, 178 (1986).

[1] All dates are in 1990.

[2] *Teamsters Local 812 v. NLRB,* 657 F.2d 1252, 1263 (D.C. Cir. 1980). ("The remaining question-whether the union pursued its object by "threaten[ing], coerc[ing], or restrain[ing]" Monarch-goes not to the motive underlying the boycott, but to the nature and foreseeable consequences of the pressure which the union actually placed on Monarch.")

[3] See generally *NLRB v. Twin City Carpenters District Council,* 422 F.2d 309, 315 (8th Cir. 1970).

ployer was among the targets. Moreover, her testimony notwithstanding, the conduct of this delegation was clearly more coercive than a courier's similar attempt to deliver a letter. In this regard, a messenger service would be unlikely to send six individuals, en masse, to deliver one letter. Nor would a routine messenger be likely to bypass the receptionist's desk and enter a private office when specifically requested, more than once, not to do so.

The contents of the unopened letter were actually irrelevant to the lawfulness of the incident. Rather, the aggressive conduct of these six individuals in itself was coercive, particularly since it did not occur in isolation but as part of the Respondents' overall pattern of coercive conduct. Accordingly, this incident violated the Act.

II.

There were two incidents on November 2. One occurred at a building located at 2301 M Street N.W., in which the Lenkin family had an ownership interest.[4] The janitors who worked in this building were not involved in any strike or primary dispute and the Respondents admit that they were aware of this at the time. Nonetheless, at about 7:30 on the evening of November 2, 40 to 50 demonstrators sent by the Respondents massed at the 2301 M Street building. SEIU Organizer Kevin Brown sought to deposit leaflets inside the front door of the building which was part residential and part commercial. A rally lasting from 20 to 30 minutes ensued. Organizing Director Hennessey gave a speech while the demonstrators pounded on cans and shouted "Down with Eddie Lenkin." The demonstrators had arrived at the rally location in front of the building in a single-file formation but apparently did not continue in formation once the rally began.

The judge relied on the lack of overt confrontation between the demonstrators and the neutral's employees and the fact that ingress and egress from the building was apparently not obstructed to find that this conduct by the Respondents was not unlawful. However, in fact 40 to 50 noisy demonstrators were massed at the front entrance to a building which is part residential and part commercial at hours in the evening when a number of the residents or business tenants likely would want to leave work or return home from it. That there is no record evidence that any attempted to run the gauntlet and were blocked from doing so by the demonstrators establishes perhaps that confrontation was avoided but not that the rally itself was not coercive in design and effect. Additionally, no employees working in the building and who were affected by the noisy and disruptive presence of the demonstrators were employed by any primary at issue in this case. Again, the Respondents are bound not by whether their secondary pressure was proven to be largely or only moderately successful, but rather by the nature and foreseeable consequences of their actions. By this test, the rally at 2301 M Street was coercive within the meaning of the Act and constitutes a violation of it.

III.

On November 6, two JFJ representatives appeared unannounced at Lenkin headquarters in Bethesda, Maryland. A property manager told them they were in a private office and did not belong there. Nonetheless, the two individuals proceeded to give the manager a handbill and to distribute them throughout the offices. The manager called the police. Handbills were also left in the first floor restroom.[5] This incident lasted for 10 to 15 minutes.

Once these individuals representing the Respondents were asked to leave the premises, they were on notice that their presence inside the neutral's offices was unwanted and intrusive. Thereafter, their invading individual offices in order to leave handbills was coercive and far exceeded the bounds of mere "publicity." Again, this conduct must be viewed as it would be perceived in the context of the Respondents' overall campaign of harassment of these neutral employers, and the Respondents thus should be found to have violated the Act by this conduct.

## 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT induce or encourage employees of Washington Square Limited Partnership, The Lenkin Company Management, Inc., Arent, Fox, Kinter, Plotkin & Kahn, PMI, Monument Parking, or any other person engaged in commerce or in an industry affecting commerce, to refuse in the course of their employment to perform any services where an object is to force or require any person to cease doing business with the United

[4] A company owned by the Lenkin family managed two of the properties in downtown Washington which were part of the JFJ campaign.

[5] The handbills spoke of the primary dispute, contrasting the janitor's wages and benefits with the wealth of landlords and asserting that the developers should be held accountable.

States Service Industries (USSI) or Red Coats, or to require USSI or Red Coats to recognize or bargain with us.

WE WILL NOT threaten, coerce, or restrain Washington Square Limited Partnership, The Lenkin Company Management, Inc., Arent, Fox, Kinter, Plotkin & Kahn, PMI, Monument Parking, or any other person, where an object is to force or require any person to cease doing business with USSI or Red Coats, or to recognize or bargain with us.

WE WILL NOT block access to the Washington Square parking garage through patrolling and leaving a locked car at the entrance of that facility.

WE WILL NOT assault supervisors or a tenant's customer during an unlawful demonstration in the Washington Square lobby.

WE WILL NOT impede access to Washington Square by having our pickets handcuff themselves to the building's doors.

WE WILL NOT threaten employees with bodily harm when they seek to halt demonstrations outside 2100 M Street.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

SERVICE EMPLOYEES INTERNATIONAL UNION AFL–CIO, CLC; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 525, AFL–CIO

*Steven L. Socolow, Esq*. and *Sherrie T. Black, Esq*.,[1] for the General Counsel.[2]

*Larry Engelstein, Esq.*, of Washington, D.C., for the Respondents.

*Stanley J. Brown, Esq.* and *Joanne Ochsmann*, *Esq*.[3] *(Arent, Fox, Kintner, Plotkin & Kahn*), of Washington, D.C., for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. General Maintenance Service Co., Inc. (General Maintenance) filed charges in Cases 5–CB–6558 and 5–CB–6584 on May 2, 1990, as amended on June 1 and 11, 1990,[4] alleging that on April 4, Respondents Service Employees International Union and Service Employees International Union Local 525 (International Union and Local Union, respectively[5]) threatened, restrained, and coerced Charging Party's employees and those of the Charles E. Smith Companies. Thereafter, on June 15, an order consolidating cases, consolidated complaint and notice of hearing issued in those cases alleging, in substance, that Respondents violated Section 8(b)(1)(A) of the National Labor Relations Act by impeding an employee's access to a building and by threatening bodily harm to another individual in the presence of employees. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On November 13, Washington Square Limited Partnership (WSLP) filed charges in Case 5–CB–6712 (1 and 2) alleging that Respondents had restrained and coerced employees of WSLP and United States Service Industries, Inc. (USSI). In another charge filed on the same date, as subsequently amended on December 5, WSLP also alleged that Respondents engaged in various acts to induce and encourage WSLP employees to strike or refuse to perform services, to compel WSLP to cease doing business with USSI and to force WSLP and/or USSI to recognize and bargain with the Unions.

On December 4, the Lenkin Company Management, Inc. (Lenkin) charged in Cases 5–CC–1119 and 5–CC–1120 that Respondent had committed various unlawful acts to coerce Lenkin employees to engage in a strike or refuse to perform services, to threaten or coerce Lenkin in order to compel it to cease doing business with Red Coats, Inc., and to compel both Lenkin and/or Red Coats to recognize and bargain with the Unions.

On March 14, 1991, the Regional Director for Region 5 issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 5–CC–1118 (1 and 2), 5–CC–1119, and 5–CC–1120 alleging that Respondents had violated Section 8(b)(4)(i) and (ii)(B) by engaging in unlawful conduct on various dates between October 17 and November 15. On April 8, 1991, all of the above-captioned cases were consolidated for hearing.

The Respondents filed timely answers to the March 14, 1991 consolidated complaint, and set forth seven affirmative defenses. On May 21, 1991, the Charging Parties moved to strike Respondent's affirmative defenses. Thereafter the General Counsel joined in the motion to strike affirmative defenses two through seven, and the Respondent filed a brief in opposition.

On June 4, 1991, the first day of hearing, I denied the General Counsel's and the Charging Parties' motions to dismiss with leave to renew without prejudice after the Respondents presented their case-in-chief. I also granted the General Counsel's motion to amend complaints which, inter alia, deleted an alleged violation of Section 8(b)(1)(A) and added three allegations of 8(b)(4) misconduct. Respondents entered denials to the amendments on the record.

On September 30, after the testimonial portion of the hearing had concluded, the General Counsel and the Charging Parties filed motions and extensive briefs seeking partial summary judgment with respect to Respondent's affirmative defenses. The Respondents also submitted a lengthy brief in opposition. In a November 1, 1991 telephone conference call with the parties' counsel, I orally granted summary judgment as to Respondent's affirmative defenses two through seven. The findings of fact and conclusions of law supporting that judgment are set forth below.

The consolidated cases were tried in Arlington, Virginia, on June 5 through 7, and 10 through 12; on July 15 through 18 and on August 9, 12, and 29, 1991, at which times the parties were afforded full opportunity to examine and cross-examine witnesses and introduce relevant documents.[6] On the entire re-

[1] Black appeared on behalf of the General Counsel solely in the General Maintenance case.

[2] Hereinafter, the General Counsel.

[3] By letter dated May 21, 1992, Ochsman withdrew her appearance as counsel for the Charging Parties and AOBA.

[4] Unless otherwise noted, all events occurred in 1990.

[5] The International and the Local Unions also may be referred to collectively as the Respondents or the Unions.

[6] Exhibits introduced into evidence by the General Counsel will be referred to as G.C. Exh.; the Respondent's exhibits will be cited as R.

cord, including my observation of the demeanor of the witnesses, and after careful consideration of the parties' briefs, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Jurisdiction over the parties in this proceeding is uncontested. Accordingly, I find that the Respondents are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act, and that the Charging Parties are employers within the meaning of Section 2(2), (6), and (7) of the Act.

### II. OVERVIEW

The allegations in the consolidated complaint challenge actions taken by the SEIU to organize janitorial workers in Washington, D.C., as part of the Unions' nationwide campaign titled "Justice For Janitors" (JFJ). Part one of this decision concerns several alleged violations of Section 8(b)(1)(A) of the Act stemming from a brief strike led by the SEIU at a building serviced by janitorial employees of the General Maintenance Company. Part two addresses allegations that the SEIU engaged in unlawful secondary activity when it picketed, handbilled, and demonstrated at buildings and homes owned and/or managed by the Charging Parties, Washington Square Limited Partnership, the Lenkin Company, and their principals, as part of a campaign to obtain recognition for janitors employed by two primary employers, United States Service Industry (USSI) and Red Coats Company (Red Coats).

## Part One: The General Maintenance Case

### I. THE FACTS

General Maintenance provides janitorial services for a building at 2100 M Street N.W., Washington, D.C., managed by the Charles E. Smith Company.[7] In January, Paul Scully, an agent of the SEIU International Union, began to assist Local 525 in its efforts to organize the General Maintenance janitors assigned to that building. Scully met with employees on a weekly basis, often using a lunchroom in the building for that purpose with a tenant's consent. He testified that early in the campaign, Selene McCullough, one of the General Maintenance employees assigned to that building, executed an authorization card and attended a number of the Union's meetings.

In late March, the General Maintenance employees voted to strike but did not immediately choose a specific date. However, the following week, the employee leaders decided to commence the strike on April 4, and notified their fellow workers of this decision as they arrived for work that evening.

McCullough arrived at the 2100 M Street site at approximately 5:30 p.m., a half hour before the start of her 6 p.m. shift, and found some 15 to 20 people, most of whom were her coworkers, assembled in front of the building. A number in the group were bearing "Justice For Janitors" signs and some were distributing pamphlets. As she approached the group, Union Agent Scully told her that the General Maintenance employees would not be working that day. McCullough acknowledged that she knew Scully and had spoken with him on previous occasions.

McCullough continued to talk with other employees outside the building trying to decide whether to report to work. After some 25 minutes, she opted to work and started to enter the building by walking down a ramp which led to a side door at a loading dock. A General Maintenance supervisor inside the doorway beckoned her to enter. According to McCullough, Scully and another union organizer, Eric Cauthern, followed her and stood in front of the side door preventing her entry. Scully briefly put his hand on her shoulder while he and Cauthern tried to persuade her not to work that evening. However, she insisted she wanted to work and attempted to pass them.

After 2 or 3 minutes, Stephen Dixon, a building manager at the 2100 M Street location, politely asked the men to move to the street level and permit McCullough to enter the building. Dixon stated that he had to repeat his request several times and when he got no response from either man, tapped Cauthern on the shoulder. Cauthern reacted by telling him to "get the fuck out of his face." (Tr. 50.) At this point, McCullough entered the building just at 6 p.m.

Dixon stated that he momentarily left the scene to call the police. On returning to the loading dock, Cauthern, who was walking toward an adjacent independent parking garage, asked Dixon when he got off from work and promised to come back and kick his "ass."[8] Several minutes later, Dixon observed Cauthern drive a van to the front of the building, collect the demonstrators, and depart by 6 p.m. before the police arrived.

Kelso Stewart, a Charles E. Smith supervisor, also observed McCullough's and Dixon's encounters with the Union's agents. However, I do not rely on his recollection of this episode for it was far different than the testimony offered by any of the other witnesses. For example, he maintained that both incidents lasted for approximately 15 to 20 minutes, 10 minutes longer than any other estimate. He further claimed that Cauthern grabbed Dixon's shirt collar, yet, Dixon did not report that Cauthern touched him.

Scully's testimony regarding this episode differs in small but significant ways from the accounts of the Government's witnesses. First, he noted that five or six General Service employees crossed the picket line and reported to work that evening without any interference from the Union's agents. However, he

Exh.; the Charging Parties' exhibits as C.P. Exh.; and Joint Exhibits as J. Exh., followed in each instance by the appropriate exhibit number. References to the transcript shall be cited as Tr. followed by the appropriate page number.

After posttrial briefs were submitted, the Charging Parties sent certain documents to the Respondents which by inadvertence had not been produced pursuant to to the Unions' subpoenas. The Charging Parties also submitted to me for in camera review, a large group of documents which they claimed were privileged or outside the scope of the subpoenas. On examining these documents, I determined that several should be submitted to the Respondents. Subsequently, by cover letter of May 4, 1992, Respondent requested that they be admitted into evidence as R. Exhs. A and B. By letters dated May 13 and June 1, 1992, the Charging Parties opposed the admission of these documents. On May 18, Respondents replied by facsimile transmission to the May 13 letter. Finding that the two exhibits are relevant and do not significantly tax an already extensive record, I admit R. Exhs. A and B into evidence.

[7] Unless otherwise specified, all events occurred in the District of Columbia.

[8] No one else testified about this incident since McCullough had already entered the building and Scully apparent,ly was elsewhere. Cauthern was no longer employed by the Union at the time of the instant hearing and was not available to be called as a witness. Accordingly, Dixon's testimony as to his second encounter with Cauthern is uncontradicted.

believed that McCullough was quite ambivalent about her role in the strike. Twice she agreed to stay out of work only to change her mind. Finally, she started down the ramp as a General Maintenance supervisor beckoned to her to enter the building and report to work. Scully related that he was at her side attempting to convince her to join the strikers, when Cauthern joined them in the loading ramp area. According to Scully, the three of them paused but continued talking; McCullough was closest to the door, while he and Cauthern were side by side to her left. At this juncture, according to Scully, the building manager appeared and asked them to leave the property. Scully told him not to worry, that they were just having a conversation. Insistent, Dixon put his hand on Cauthern's shoulder and again ordered them to leave. Scully testified that Cauthern told Dixon to take his hand away, but did not curse. He did not recall that McCullough expressed a desire to get past them to report to work during their brief, 30-second conversation.

## II. DISCUSSION AND CONCLUSIONS

The General Maintenance case poses two questions: (1) whether Respondents' agents attempted to impede a General Service Maintenance employee from entering the building where she worked during the course of a brief strike; and (2) whether one of the agents threatened and attempted to assault Dixon outside the same building thereby violating Section 8(b)(1)(A).

Section 8(b)(1)(A) prohibits a labor organization from "restrain[ing] or coerc[ing] employees in the exercise of rights guaranteed by Section 7 of the Act." Whether strike-related conduct will be found unlawful depends on whether, within the objective circumstances of each case, it "may reasonably tend to coerce or intimidate employees in the exercise of rights protected by the Act." *Clear Pine Mouldings*, 268 NLRB 1044, 1047 (1984). On applying the *Clear Pine* standard in *Tube Craft, Inc*., 287 NLRB 491 (1987). The Board observed that:

> [a]lthough peaceful picketing unquestionably includes the right to make nonthreatening appeals to those who are about to cross a picket line, the decision of such persons to ignore such appeals must be respected. Thus, physical obstruction of an entrance has been held to violate Section 8(b)(1)(A) of the Act when attributable to a union.

*Tube Craft* involved four incidents in which three or four strikers blocked the path of trucks preventing them from entering or exiting the employer's premises for periods of time ranging from 2 hours and 30 minutes to 50 minutes. The Board viewed this conduct as neither trivial nor isolated; rather it was found to be part of a pattern of obstructive conduct that amounted to "coercion and intimidation of the truckdrivers." Id. at 492–493.

The first incident at issue in the instant case involving McCullough bears little resemblance to the encounters described in *Tube Craft*. A logical synthesis of both McCullough's and Scully's testimony leads to the conclusion that the Union's organizers momentarily impeded McCullough from entering the building while attempting to persuade her to join her striking coworkers. McCullough initially had demonstrated great ambivalence about whether to join the strikers or go to work. In following her down the loading ramp, I conclude that the Union's agents were doing nothing more than trying to change her mind once again, just as she had done twice before. If they had intended to prevent her from entering the building by physically barring her way, I have no doubt that they could have done so.

Scully acknowledged putting his hand on McCullough's shoulder; however, I infer that he did not use a strong arm tactic, for she did not refer to his touching her at all.[9] Noting that McCullough and Scully were on friendly terms and had talked on a number of occasions, I do not find anything sinister in what seems to have been little more than a casual gesture.

The entire episode could not have taken more than a few minutes and was the only time that any blocking allegedly occurred. Yet, it is undisputed that the Union made no effort to prevent four or five other employees from entering the building. Thus, there is no pattern of obstructive conduct here as there was in *Tube Craft*. Even assuming this incident qualifies as blocking, it was momentary and noncoercive, amounting to an inconsequential act of misconduct. See *Ornamental Iron Work Co*., 295 NLRB 473 (1989). In fact, the entire incident may be considered de minimis in that it was of limited duration, impact, and significance. Thus, it does not warrant condemnation as a violation of Section 8(b)(1)(A). See *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973).

Cauthern certainly was hostile, but he did nothing more than hurl a few common curse words at Dixon. His first comment—that the building engineer should "get the fuck out of his face" was unjustified, but was blurted out in response to Dixon's intervention and his ordering the union agents to leave the immediate area.

Cauthern's subsequent jibes were even more unwarranted. However, he delivered his parting rude remark to an individual who was not engaged in the picketing and who had no connection with the primary employer. It is true that threats and other acts of intimidation directed at nonemployees may be unlawful, but only if other employees would be likely to hear about it. See *North American Meat Packers Union (Hormel & Co),* 291 NLRB 390, 395 (1988). No evidence was presented in this case to suggest that other employees overheard or learned of Cauthern's comments to Dixon.[10]

Further, Cauthern's passing remarks were not part of a pattern of intimidating behavior. A promise to "kick ass" is virtually a cliche today[11] and bears no resemblance to serious threats like those made to replacement workers in the bitter Hormel strike. Id. As noted in *Machinists Lodge 1233 (General Dynamics)*, 284 NLRB 1101, 1106 (1997), tempers run high during strikes and language employed at such times will not necessarily be couched in "tearoom style." Accordingly, although Cauthern's conduct should not be condoned, neither does it warrant remedial action. Accordingly, the complaint in this matter should be dismissed.

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[9] Stewart was the only one to suggest that Scully grasped McCullough's arm in a forceful manner.

[10] The General Counsel concedes in his brief that Cauthern's remark probably was made "out of range of either McCullough or Scully," the only other persons who might have been on-the-scene witnesses. (See G.C. Br. 114 fn. 60.)

[11] Indeed, President Bush used this expression on national television during the 1988 election campaign.

## Part Two: SEIU Versus WSLP and the Lemkin Company

### I. BACKGROUND—THE ACTORS

#### *A. Secondary Employers*

##### 1. WSLP

The office building at 1050 Connecticut Avenue, one of Washington, D.C.s more prestigious business addresses, and the situs of much of the Union's activity at issue here, is owned by Charging Party, WSLP. WSLP is a business entity composed of two families prominent in the area's real estate community—the Abramsons and the Lerners. Specifically, Albert (Sonny) Abramson is the managing member of a partnership which includes his son Gary. Abramson family members also compose another partnership, the Tower Construction Company, which develops, owns, and manages real estate.

The Lerner's ownership interest in the WSLP enterprise was through Theodore Lerner and Lerner Enterprises Limited Partnership whose managing partner was Mark Lerner. The Lerners and Abramsons also jointly own White Flint Mall, an upscale shopping center in suburban Maryland. Separately, members of each family possess interests in numerous other properties in the District of Columbia, Maryland, and Virginia.

The Lerner family also engages in business as the Lerner Corporation, a real estate management firm, which began to manage Washington Square in the fall of 1990. Headquartered in Bethesda, Maryland, the Lerner Corp. formulated written employment policies which were distributed to the 26 managerial, security, and maintenance employees whom it hired and assigned to the Washington Square building. At the time of the events alleged in the complaint, Sandra Reed was the Lerner Corp.'s onsite building manager for Washington Square, with supervisory authority over five other supervisors, including, inter alia, Cynthia Carr, maintenance staff supervisor, and Jack Remick, chief of a nine-man special security force.[12]

The 12-story Washington Square building, prime property on the southwest intersection of Connecticut Avenue and L Street, contains commercial office space, retail establishments on the street and lower lobby levels, and an independently owned parking garage, PMI, which fronts 18th Street.

Under Lerner's management, its nine-member maintenance crew worked solely during the daytime, performing various chores such as changing light bulbs and air filters, correcting minor plumbing problems, and steam cleaning certain outside areas including the adjacent loading dock and sidewalks. Lerner also employed a single janitor at Washington Square who, with a USSI janitor, cleaned the quarters of a tenant, the U.S. Secret Service, during daytime hours only.

##### 2. The Lenkin Company

The Lenkin Company Management Inc., whose officers are Edward Lenkin and his parents, Melvin and Thelma, manages 20 to 24 properties, including 2 at 1130 and 1133 Connecticut Avenue, N.W. where other justice for janitors activities occurred. The Lenkin family also has an ownership interest in the Aspen Hill Racquet Club and Fitness Center in Silver Spring, Maryland, a facility which became the locus of an intrusive SEIU demonstration.

Lenkin property managers each oversee three buildings. In the fall of 1990, Lorraine Flenner and Sheila Mendel were the property managers for 1130 and 1133 Connecticut Avenue N.W., respectively; both women reported to Lenkin's director of property management, Al Moler, who, in turn, reported directly to Edward Lenkin. In addition, Lenkin employed a chief engineer, assistant engineer, and a day porter at each of these buildings.

#### *B. The Primary Employers*

The primaries in this case, two of the larger independent janitorial contracting firms in the District of Columbia, are United States Service Industries, Inc. (USSI) whose employees provide cleaning services for Washington Square, and Red Coats which supplies janitorial services for many Lenkin-managed buildings, including the two at 1130 and 1133 Connecticut Avenue. In addition, a Red Coats subsidiary, Admiral Security, provides guard services at the 1130 address.

#### *C. The Respondents*

The SEIU formed Local 525 in 1987 in connection with its campaign to organize janitors in the District of Columbia. Jay Hessey served as the Local's first president until October 1990 when he was elected its organizing director. A number of SEIU employees were assigned to assist Local 525 during the JFJ Campaign including Stephen Lerner, David Chu, and Kevin Brown.

#### *D. AOBA*

The Apartment and Building Association, uniformly referred to as AOBA, is a voluntary trade association composed of "active members" who are owners and/or managers of office and residential buildings, and "associate members," who supply goods and services to active members. AOBA's purposes, generally, are to represent its members' interests as they are affected by legislation, conduct educational forums, and distribute information. Although not a formal party in this case, it figured prominently in these proceedings, as detailed further below.

AOBA is led by a board of directors consisting of 33 active members, 3 associate members, and 1 director at large appointed by the president. Only active members may vote at member meetings and be counted toward a quorum. The board of directors elects AOBA's officers—a president, president-elect, commercial vice president, three area vice presidents, treasurer, and executive director who serve as the executive committee for 1-year terms. From 1987 through 1989, AOBA had approximately 800 to 900 members.

Senior officials of the Charging Parties, the primaries and General Maintenance all participated actively in AOBA during the period of time relevant to this litigation. Thus, Edward Lenkin was on the AOBA executive committee from 1987 through 1990, serving as commercial vice president, president-elect, president and past president during those years. Mark Lerner was on the AOBA board of directors from 1987 through 1990, as was James Schneider, a Tower official, and Richard Thompson, CEO of General Maintenance.

AOBA also employees a paid administrative staff, headed by an executive vice president. Donald Slatton held this position from 1987 to November 1989 and following his resignation, was succeeded by Margaret Jeffers. The executive vice president is responsible for managing the affairs and operations of the Association under the tutelage of the executive committee

[12] In past years, Tower Construction managed the building. Tower also manages a building at 1707 L Street, N.W., the scene of one of the incidents alleged to be unlawful in the complaint.

and board of directors. As Slatton testified, he implemented, but did not formulate, AOBA's policies. He explained that as a voluntary organization, AOBA has no authority to compel a member to take any action or adopt any position.

*E. Arent, Fox*

The law firms of Arent, Fox, Kintner, Plotkin & Kahn (Arent, Fox) wore three hats in this proceeding. First, Arent, Fox was retained counsel for the Charging Party, AOBA. Second, the law firm was an associate member of AOBA from at least 1987 through 1990 and, third, it is a tenant in the WSLP building, occupying floors four through seven.

The Respondent's assert as an affirmative defense that Arent,, Fox was the chief architects of AOBA's scheme to combat the SEIU and thereby forfeited its neutral status. Consequently, Respondent argues that it did not violate the Act, as alleged in the complaint, when it invaded Arent, Fox's offices on November 15, as described in greater detail below.

*F. The Relationship Between the Allegedly Neutral and Primary Employers*

1. Day-shift janitors at Washington Square

The relationship between USSI and Washington Square is relevant to two issues in this case: first, whether Lerner Corporation and USSI were joint employers and, second, whether the Union's activities at WSLP complied with the standards governing lawful common situs picketing as articulated in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1956).

USSI has supplied cleaning services for Washington Square since at least November 17, 1988 pursuant to a "Janitorial Services Contract" which the parties followed but never executed due to a disagreement over the amount of space to be cleaned. Among the contractual terms was one which provided that nightshift employees would be paid according to a base rate multiplied by the square footage cleaned, while day workers would receive a flat rate. Correspondence was received into evidence indicating that Lerner rejected USSI's request for a rate increase in 1990.

The contract stated that "janitorial services provided by USSI shall comport with Appendix A attached hereto," but no such appendix was produced.[13] The Respondents introduced an exhibit titled, "Washington Square Specifications Building Janitorial Maintenance" suggesting that it might be the missing appendix. This exhibit set forth in great detail the precise services which the "Lessor," WSLP, promised its tenants would be furnished by the cleaning contractor. Property Manager Reed testified that such a specification might accompany a tenant lease; but she disclaimed familiarity with its terms and denied ever having relied on it.

Lerner is not at all involved in USSI's hiring processes. Robin Allen, USSI day operations manager, whose office is at USSI's headquarters on 1424 K Street N.W., testified that she accepted job applications at USSI headquarters on 1424 K Street N.W. and subsequently notified applicants when openings arose. USSI determined the number of cleaners to be assigned to various buildings. In the fall of 1990, five or six janitors worked a 7 a.m. to 3 p.m. (daytime) shift at Washington Square, clocking in and out on a timeclock at the building which was separate from the one used by Lerner's maintenance employees. Generally, the USSI day cleaners were assigned to clean common areas in Washington Square such as the lobbies, corridors, and restrooms. They were not responsible for the retail shops located on the entrance and lower lobby floors. USSI maintained a small office furnished with desk and telephone on the lower lobby level of the building where it stored cleaning supplies and other equipment. The only USSI day employee to possess a key to this room was a James Taylor who, Charging Parties claim, is a supervisor.

Although Reed denied that USSI employees use Lerner supplies or perform duties regularly assigned to Lerner staff, Francis Adigun, a USSI day cleaner, testified to the contrary. He stated without contradiction that on request of the USSI day janitors, Lerner Maintenance Supervisor Carr dispensed such articles as toilet paper and towels to them. Also uncontroverted was Adigun's testimony that he possessed a key to the Washington Square supply room, from which he borrowed mops, brooms, cleaning agents, and a large vacuum machine to clean the exterior sidewalks, a task which supposedly was performed solely by Lerner maintenance personnel.[14] Further, again contradicting Reed, Adigun disclosed that the USSI and Lerner employees shared a common breakroom at Washington Square.[15]

The parties presented sharply conflicting testimony about the extent to which Lerner and USSI exercised supervisory authority over their day workers. Allen testified that she had oversight of 16 employees in various buildings, which she visited sporadically on an as-needed basis; typically, several times a month. However, she maintained constant contact with the building by way of a paging device. According to both Allen and Reed, USSI employee James Taylor served as the day-shift onsite cleaning supervisor at the Washington Square building. Allen believed he had authority to discipline employees and recalled one occasion when he had exercised it. While acknowledging that she determined which tasks particular employees would perform, she asserted that Taylor trained new employees. Adigun once more contradicted Allen's assertion, claiming that it was Lerner's maintenance supervisor, Carr, who showed him what he was supposed to do.

It is less than certain that Taylor actually performed supervisory duties. He did not testify and Allen was unable to state what percentage, if any, of his working day Taylor devoted to supervisory tasks. However, given Adigun's testimony that Taylor's job was to clean the men's restrooms on all 12 floors of the building, it is fair to infer that his cleaning chores consumed virtually all of his part-time shift. Taylor wore no badge or uniform which differed from those worn by his coworkers or identified him a supervisor. Although he delivered the five employees' timecards to Allen twice a month, nothing about his

[13] Building Manager Reed suggested that the word "Appendix" was mistakenly used instead of "Addendum" which was affixed to the contract. However, the two addenda attached to Exh. 10 have nothing to do with the matters set forth in an appendix.

[14] Adigun was not an educated man and had difficulty expressing himself. However, I do not confuse his lack of articulateness with an inability to tell the truth. I note that he did not take part in the SEIU strike and testified under subpoena. These facts suggest that he was not predisposed to the Respondents, causing him to slant his testimony in their favor. For these reasons, I do not infer that because Respondent, introduced him as their witness, his interests were wholly aligned with theirs or that he testified falsely.

[15] I credit Adigun on this matter, rather than Reed, for she had no reason to use the breakroom and, thus, was not in a position to know whether or not Lerner and USSI day workers used it jointly.

card or his pay singled him out from the rank and file. Moreover, Allen, not Taylor, was responsible for locating a substitute for an absent USSI employee.

Interestingly, Reed testified that if a cleaning problem arose, she contacted USSI Vice President Gallagher or Allen, not Taylor.[16] Although Reed maintained that Taylor was the daytime onsite supervisor, it was almost as an afterthought; she did not suggest that she turned to him for corrective action. In fact, Reed stated emphatically that she instructed Lerner personnel not to interact with the USSI janitors. Instead, they were to bring any questionable matters to her and she, in turn, would resolve them with USSI management. Here, too, Adigun's testimony conflicted with Reed's, for he stated that Carr showed him what was required, assigned him extra work, and even had him substitute for Lerner maintenance employees when they were absent, sometimes as often as twice a week. Carr did not appear as a witness so Adigun's testimony on this score was unrebutted.

2. USSI night-shift cleaners at Washington Square

Fifty to sixty USSI janitors were assigned to the night-shift squad at Washington Square. For this number of employees, USSI assigned three onsite supervisors. In addition, a project manager visited the building once each evening. The night cleaners' major contact with Lerner personnel came chiefly at the beginning and end of their shifts when they received and later returned keys to tenant offices from a security guard stationed in the lobby.

Initially, in the fall of 1990, working hours for night janitors at Washington Square were from approximately 6 p.m. to midnight. Reed testified that USSI Official Gallagher informed her that the night janitors' hours would change to 10 p.m. to 4 a.m. at some unspecified time in November. She added that 2 weeks later, Gallagher advised her the hours would be revised again to 12 to 6 a.m.[17] No other witness offered any first-hand information about the hours which night-shift janitors actually worked or when, if ever, the revised schedule went into effect. Reed's testimony as to what Gallagher told her was admitted solely for the purpose of laying a foundation for what actions Reed subsequently took, and not for the truth of the matter asserted.

3. The relationship between Lenkin and Red Coats

Red Coats provided cleaning services for buildings managed by Lenkin at 1130 and 1133 Connecticut Avenue, among others.[18] The contract for Red Coats' services at the 1133 address provided that payment would be based on square footage cleaned; could be reopened for renegotiations in the event, of a "change in union scale"; and canceled on 30 days' notice. Red Coats was obliged to provide its own equipment and supplies which it kept in a storage room in the building. Lenkin and Red Coats did not execute the contract applicable to the 1130 building because of a dispute not relevant to this proceeding. Nevertheless, the parties adhered to its terms, which generally were similar to those in effect at the 1133 site.

Lenkin's property manager at 1133 Connecticut, Sheila Mendel, testified that Red Coats prepared a document titled "Cleaning Specifications" which outlined the cleaning services to be provided. Neither Mendel nor any of the other Lenkin employees including a building engineer, assistant engineer, and maintenance porter, had working hours which overlapped with the 6 to 11 p.m. shift of the Red Coats cleaners. Similarly, at the 1133 Connecticut Avenue Building, Red Coats janitors worked 5 days a week from 6 to 10 p.m.; and used supplies provided by their employer which were stored in a separate area on site.

If the property managers at either building had complaints about cleaning services, they conveyed them to Red Coats managerial personnel. Thus, Lenkin employees had no overlapping working hours with Red Coat janitors, with one exception—a security guard with Admiral Security Services, a firm owned by Red Coats President William Peel Jr. was detailed to the 1130 address from 8 a.m. to 6 p.m.

No member of either the Lerner or Lenkin families held ownership or other financial interests in USSI or Red Coats. However, in 1987, a Red Coats' subsidiary, Data Watch, purchased the Morrison Group, a company specializing in security services in which the Lenkins had a 50-percent interest. At the hearing, Peel announced that he recently had completed payments for that transaction.

## II. FACTS RELEVANT TO RESPONDENTS' AFFIRMATIVE DEFENSES

### *A. The Parties' Positions*

The facts presented in the following section of this decision are relevant to the Respondent's affirmative defenses and the General Counsel's and the Charging Parties opposition thereto. The events recited below began in 1987 long before the statutory period of limitations set forth in Section 10(b) of the Act began to run. However, the Respondent relies on the Charging Parties' and AOBA's conduct during this early period to prove that from the outset, even before its organizational activity began, building owners and managers made common cause with janitorial contractors through AOBA's agency, to thwart the JFJ campaign. Accordingly, the SEIU claims that the Charging Parties enmeshed themselves in the labor affairs of the primary employers, and thereby forfeited their neutral status.

The General Counsel and the Charging Parties deny that AOBA's activities were designed to oppose union representation of the cleaning employees. Instead, they assert that AOBA and its members wanted to make sure that Union representation would be determined by means of a duly authorized NLRB election. They further contend that AOBA formulated a strategy solely to what was perceived as the Respondents' unlawful pressure tactics. This strategy relied on member education, distribution of information, and provision of counsel to owners in meetings with the SEIU.

### *B. Respondents Launch the JFJ Campaign*

In the summer of 1987, Local 525, with assistance from the International, launched the JFJ campaign in the District of Columbia as part of a nationwide effort to organize janitors who cleaned commercial office buildings.[19] As the campaign pro-

[16] Reed also indicated that on rare occasions, she dealt with USSI President Matthews.

[17] Reed's testimony as to what Gallagher told her was admitted solely for the purpose of laying a foundation for what actions Reed subsequently took, and not for the truth of the matter asserted.

[18] Red Coats is a major custodial contractor in the area with something between 130 and 160 accounts. The Lenkin family also has an ownership interest in the 1133 Connecticut Avenue property.

[19] On or about late 1986, David Chu, SEIU's director of research, and his staff began to collect information about the real estate holdings

gressed, union leaders sought to meet not only with the cleaning contractors who employed the janitors, but also with owners and managers of buildings where the janitors performed their services. From the outset, the SEIU announced that its tactics would include persuading real estate owners and managers to use their influence with cleaning contractors to recognize Local 525.

In the summer of 1987, Jay Hessey and Steven Lerner met with officers of a number of contracting companies, among them, Richard Thompson of General Maintenance. Thompson testified that the SEIU representatives told the group that an organizing campaign would commence; that "owners were going to be approached and pressure was going to be put on them to recognize the Union." (Tr. 1815.)

In September of that year, pursuant to the SEIU's invitation, AOBA Executive Director Slatton met with SEIU International President Sweeney, Hessey, and Lerner at the Union's headquarters. Slatton recalled that Sweeney discussed the Union's desire to gain fair wages for janitors and the advantage to the owners' and contractors' of having a stable work force. Sweeney then suggested that the union, contractors, and building owners had common interests which would be promoted by an amicable relationship. Slatton stated that he pointed out to Sweeney that neither AOBA nor its members employed janitors. The SEIU president apparently appreciated this point for he replied that the Union "was going to try to get AOBA to tell its members to tell their cleaning contractors to recognize the union." (Tr. at 1208–1209.)

Slatton further testified that as he was being escorted out of the building at the meeting's end, Hessey "got in [his] face" and said "We intend to organize the janitors. We can either do it with your help or without. . . . If you get in our way, we're going to run over you, and its in your best personal interests [sic] to cooperate with us." (Tr. 1365–1366.)

### *C. AOBA Mounts a Countercampaign*

During this same period, that is, in late summer and early fall 1987, various building owners and managers reported to Slatton that the Union had contacted them. Cleaning contractors, including Thompson of General Maintenance, also informed Slatton that the SEIU had demanded voluntary recognition.

Sometime in September, AOBA convened a meeting of building owner members and most large cleaning contractors at which they discussed the union organizing drive. Minutes of a September 15, 1987 AOBA board of directors' meeting indicate that Slatton advised the group that the SEIU planned to unionize all janitorial employees in the District of Columbia by early 1988. He also reported that several AOBA members met with "a leading management labor attorney, Alan Segal [sic]," to formulate an initial strategy to counter the union's effort. A motion "to devote staff time and Board of Directors involvement in the effort to counter the attempt to unionize service employees" was approved unanimously with representatives of the alleged neutrals—Edward Lenkin, Mark Lerner, and James Schneider (for Tower), joining in the vote.

Soon thereafter, AOBA formed a special task force to formulate a response to the Unions' anticipated organizing campaign. It also established an AOBA-SEIU Committee. On October 1, the task force met with Arent, Fox Attorney Siegel to examine whether AOBA should retain the law firm to represent it and its members vis a vis the SEIU.

None of the witnesses who attended the initial meeting of the SEIU-AOBA task force were able to recall they discussed. However, in a letter written at a later point in time, a member of the task force refers to the discussion that took place then:

> [T]here was some disagreement among the taskforce . . . as to the pressure which might be directed at AOBA once this matter is publicized by union or other sources. Some members feared that AOBA's involvement might so place it in the limelight that AOBA would become a "de facto" bargaining unit. Other members of the task force suggested that AOBA involvement could be kept at a low profile . . . . (i.e., perhaps largely informational).

Noting that "the Board must expect that AOBA will be subjected to very substantial controversy and pressure, the author of the above-quoted letter noted that AOBA was well suited to deal with the SEIU campaign, pointing out that 'It is a task which if not properly and troughly [sic] undertaken now will have severe negative financial effects on all D.C. properties both immediately and for years to come."' (R. Exh. 17.)

Interestingly, Louis Trotter, one of the AOBA members who initially contacted Siegal about the SEIU organizing drive, sent the following message to AOBA's vice president on October 5, 1987, disclosing his interest in having both building owners and contractors oppose unionization:

> Basically, as I said at the meeting, I think we would be wrong to view this effort solely as a legal, rather than a political problem. If momentum builds behind the effort, either due to speeches by a Jesse Jackson/Mayor Barry type, or any other reason, it would be very difficult for owners and contractors to adopt the public position necessary to derail the effort.
>
> Therefore, I think it is imperative we plan for some type of public "preemptive" strike. I think we should consider investing up front dollars now in a public relations campaign that will be ready to roll in full force at the first sign that the unionization effort is going public. If we first begin to think about how we will react to the union's publicity at the time it occurs, we will never be able to get ahead of them . . . . [R. Exh. A.]

The AOBA-SEIU task force met again on October 7, 1987, to develop a proposal as to what AOBA's role should be in confronting the justice for janitors campaign. Redacted minutes indicate that a representative of the Lenkin Company was present.

A day later, SEIU International President Sweeney wrote to 23 property developers in the District of Columbia requesting a meeting and reminding them of the de facto control which they exercised over the janitors' working conditions. The letter stated:

> In the months ahead, Washington, D.C. will see an increasingly visible and aggressive campaign to organize janitors. That campaign will have a direct impact on D.C. building owners and managers. While most janitors are employed by cleaning contractors, the building operators have the real power to improve the lives and futures of janitors at their properties. [G.C. Exhs. 35a–w.]

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of major commercial property owners and developers and in the metropolitan area.

On October 20, the AOBA executive committee met to consider "[w]hether AOBA should take a leadership role in an campaign to defeat the SEIU's goal of organizing the city of Washington." The executive committee also had before it a recommendation from the steering committee that:

> AOBA be the organization focal point for both AOBA members and building service contractors. AOBA's role would be as clearing house for information, educator on the "do's and don'ts" of labor law, and principal contact with the news media. [R. Exh. 29.]

In addition, the steering committee recommended retaining Siegel and Stephen Boardman of the Arent, Fox firm to represent AOBA in these matters.

In accordance with practice, an AOBA board of directors meeting followed the executive committee meeting. Minutes of the board of directors' meeting disclose that Slatton reported on "the latest developments . . . to mobilize a campaign against the" SEIU. (R. Exh. 30.) At the same time, a "Plan of Action" was presented to the Board, as well as a request for its approval of "AOBA taking a lead role in the campaign, using Allen Siegel's services as a leading management labor attorney, and the $ (redacted) that would be needed to continue this effort." (R. Exh. 30.) A motion was presented and unanimously approved "to devote Staff time, use Allen Siegel's services, and $ to counter the attempt to unionize serviceable employees in Washington." In essence, as Slatton testified, the board of directors adopted the steering committee's proposal set forth (in R. Exh. 29) which authorized AOBA to assume a leading role in orchestrating activities in opposition to the JFJ campaign.

### *D. 1987: Respondents' Early Campaign Activities*

Beginning in the fall of 1987, and continuing over the next few years, the parties engaged in various actions which did little more than drive them further apart. Slatton testified that beginning in the fall of 1987, building owners and managers, including, but not limited to, those in the instant proceeding, reported to him continuously about SEIU demonstrations taking place both outside and within various office buildings. However, he could recall no specific reports of such incidents prior to December 1987.

It was in December that the SEIU began to stage demonstrations at 1413 K Street, N.W. where AOBA's administrative offices were located. According to Slatton's eye witness account, at one point during the first such demonstration, approximately 20 to 25 union demonstrators paraded in front of the building and then rushed inside, attempting to gain access to the floor on which AOBA's offices were located. When they found that the elevator was blocked at that floor, they stopped at other floors in the building chanting slogans such as "What do we want? Justice. When do we want it?—Now." (Tr. 1387.) Slatton also witnessed several demonstrations at other buildings where AOBA was holding meetings, as well as one at Washington Square.[20]

In January 1988, Slatton received a report that SEIU demonstrators had staged a sitin in the lobby of a building owned by Cafritz, a prominent building owner who was not an AOBA member. In May of the same year, he received another report that several SEIU supporters had gained entry in the early morning hours to a Cafritz-owned building by persuading the manager that the owner had given them permission to conduct a survey there. Once inside, they began to slip handbills under office doors until the manager ordered them to leave.

As Slatton described it, one of the Unions' more intrusive actions took place in January 1989 in the Marriott Hotel where AOBA was holding its annual awards luncheon. When Slatton first arrived at the hotel, he found 25 to 30 SEIU demonstrators outside, chanting slogans in support of the justice for janitors campaign. Just as the luncheon was about to begin, Hessey, leading the band of shouting demonstrators, came to the door of the meeting room and told Slatton that the group wanted to present a petition to the assembled AOBA members. Slatton asked Hessey to leave more than once. Hessey refused to comply and rudely told Slatton to get out of his way. Shortly thereafter, security guards arrived and escorted the group out of the hotel.[21]

During the first few months of 1988 and continuing into the spring, union representatives met with with various building owners. Slatton attended a few of these meetings, as did Arent, Fox counsel. At each such meeting, AOBA took pains to point out that neither it nor building owners employed janitors and, therefore, took no position rewarding the Union's entering into collective-bargaining agreements with independent janitorial contractors. On one such occasion, Hessey became visibly upset and, pounding the table, insisted that AOBA actually controlled the situation.

### *E. AOBA's SEIU Legal Defense Fund*

Pursuant to the proposal adopted by AOBA's board of directors at its October 20, 1987 meeting, letters issued to both building owners and janitorial contractors soliciting contributions to the AOBA-SEIU legal defense fund which were earmarked for the services of Arent, Fox counsel. (R. Exhs. 133–134.)

In an early solicitation letter sent in February 1988, Slatton wrote to member building owners, managers, and janitorial contractors that it was AOBA's intent to "withstand a 'top down' organizing campaign" by Local 525, which was engaging in "Demonstrations, threatening letters, demands for meetings and signatures to 'pledge' cards." (R. Exh. 45.) Noting that "expert counsel has been retained to represent AOBA members when they become the Union's target on any given day," Slatton appealed for donations to the legal defense fund to finance "the industry effort to fight the union on all levels." Id.

In October 1988, AOBA again urged office building members in the District to donate to the fund, pointing out the SEIU's organizing effort had been unsuccessful to date, "due to the cooperation, involvement and financial support of building owners/managers and building maintenance companies" which enabled AOBA to fend off "the SEIU's attempt to use intimidation and illegal tactics to circumvent the National Labor Relations Board process." (R. Exh. 136.) At the end of this year, in a letter accompanying its annual dues invoice, AOBA touted as the first of its accomplishments that it "has led the office building industry's fight to prevent [SEIU] from organizing the janitorial workers in the District." (R. Exh. 78.)

[20] Witnesses testified about events prior to the 10(b) period only as background and to show why and how AOBA responded as it did to the Respondents' actions.

[21] The Respondents failed to rebut Slatton's testimony about this incident. However, it was not received for the truth of the matters asserted but to provide background evidence to establish why AOBA launched a countercampaign against the Unions.

In 1989, AOBA was more circumspect in articulating its position toward SEIU organizing activities. Thus, in a March 29 solicitation letter, Edward Lenkin, then president of AOBA, wrote that since building owners/managers "do not employ janitors . . . [they] take no position as to whether or not there should be a union for any given contract cleaning company.[22] It is the philosophy of AOBA's active members that such a decision should be made, as is lawfully prescribed under the National Labor Relations Act, by the employees of those contractors." (R. Exh. 82.)

Red Coats and USSI were among those who contributed $1000 each to the fund in 1987 and 1988 and $2000 in 1990. Lerner Corp. contributed $2000 in 1990, Tower gave $1000 in both 1987 and 1988 and $1000 in 1990, while Lenkin donated $2000 in the first 2 years and $1666 in 1990.

*F. AOBA Training Sessions and Meetings*

1. 1987

As discussed above, AOBA's board of directors adopted a plan of action on October 20, 1987, which authorized AOBA to serve as a clearinghouse for information, retaining labor counsel, and training "on the 'do's and don'ts of labor law." (R. Exh. 29.) In accordance with this plan, Slatton invited AOBA members to a meeting to be held the next week, on October 27, to discuss the SEIU's new citywide organizational drive.

Less than a month later, reacting to reports by building owners that the Union just that week had commenced "intensive picketing and handbilling at several properties," Slatton sent mailgrams inviting "key representatives of all owners and cleaning contractors" to a special meeting on November 19 at the offices of Arent, Fox. Slatton stressed the meeting's importance, stating that it would focus on "practical strategies about how to deal with the Union's tactics . . . [and] the immediate concrete steps that should be taken when such activities occur at your location." (R. Exh. 32.) Counsel were present at the meeting as were representatives of USSI, Lenkin, and Red Coats.

Counsel also attended a November 17, 1989 AOBA board meeting and as the minutes reflect, spoke about the SEIU and "their attempt to make Washington, D.C. a 'union city.'" (R. Exh. 33.) That same month, AOBA's monthly newsletter contained a two-page article by Arent, Fox counsel Siegel titled, "When the Union Knocks" which offered advice on "meeting a direct union effort to organize your employees." (R. Exh. 35.) First, Siegel urged the employers that if they became "aware of any overt union activity among your janitorial personnel," they should "contact the AOBA office at once." Id. Then, after outlining workers' rights and employers' obligations under the Act, and the Board's guidelines governing solicitation and distribution of union literature, the article concluded with advice regarding what should and should not be done when the union demanded recognition. The author emphasized that employers should not take any action which might appear to justify the union's claim of majority support. Instead, Siegel cautioned:

> The proper response when a union organizer seeks recognition . . . is to refer him to your superiors who will notify the organizer that: "We must decline to extend recognition to your labor organization unless and until it is certified by the National Labor Relations Board in a manner appropriate for collective bargaining." SAY NO MORE. Refuse to accept any documents from the union, such as authorization cards.

On December 10, AOBA conducted a training session attended by property owners, managers, and contractors, including representatives of the Charging Parties and the primary employers in this case. The session's advertised purpose was to prepare supervisors "to handle union activity when it occurs at your buildings." (R. Exh. 34.)

2. 1988

In early January 1988, Hessey wrote to Slatton requesting a meeting with AOBA's executive board. Hessey noted in the letter that various building owners and managers were referring him to AOBA rather than discussing the issues with him directly, leading him to believe that AOBA "has responsibility and authority to resolve matters." (R. Exh. 37.) However, only Slatton and Siegel agreed to meet with the local leader in early February. Siegel also accompanied Lenkin to a meeting with Hessey the following month.

AOBA continued to hold training sessions and serve as a clearinghouse for information about SEIU activities throughout 1988. For example, on February 11, AOBA briefed owners and managers about Local 525's recent activities and discussed appropriate responses to future union tactics. (R. Exh. 43.) Counsel were present, as were Lenkin and Red Coats' representatives, but no one appeared on behalf of Lerner, Tower, or USSI. On May 2, 1988, another meeting was held to update AOBA members about meetings between various building owners and Local 525, and "recent allegations and demands made by the Union in the course of their Justice for Janitors Campaign." (R. Exh. 48.) Officials representing the Charging Parties and the primary employers in this case attended. A memo prepared by Arent, Fox counsel dated May 2, offered advice as to steps AOBA members should take in the event they were subjected to "demonstrations, handbilling and similar activity by the SEIU." (R. Exh. 51.) The memo closed with a request that members contact AOBA or counsel if they experienced any such union activity. Id.[23]

3. The barring notices

Slatton testified that as the SEIU demonstrations continued, he received reports from building owners that the police were not responding to their calls for intervention. Accordingly, a meeting with a captain Mangily of the Metropolitan Police Department was scheduled for May 24, 1988. As arranged, AOBA staff members and counsel met with the captain and discussed procedures to be employed when building owners or managers were faced with SEIU demonstrations. Based on advice offered by the captain, counsel prepared an "Action Alert" memo dated June 1 which recommended steps that building owners and/or managers should take in the event of "any activity by individuals connected with the Justice for Janitors campaign." Specifically, the memo first advised that "In the event of any activity whatsoever, including a simple sidewalk demonstration, call 911. . . . [I]f the demonstrators enter the building at any time after you have made the initial call, you should immediately dial 911 again and inform the operator that

[22] In fact, Lenkin's statement was somewhat inaccurate for WSLP did employ a few daytime janitors.

[23] I concluded that this memo was privileged. Consequently, it was produced in response to Respondents' subpoenas with its text almost totally redacted.

there are "intruders who have penetrated the building and refused to leave." (R. Exh. 53.)

Second, the action alert memo urged the building owners and managers to write to the SEIU Local and International forthwith advising them that "individuals connected with their organizations are not permitted on your company's property in connection with the Justice for Janitors campaign." Id. A model "barring" letter was attached to the memo. Third, members were advised to keep detailed records and to notify AOBA of any incidents involving the SEIU occurring at their buildings. Slatton testified that the recommendation regarding the barring notice was based on police advice.

On June 28, 1988, AOBA issued a second "Action Alert" again urging members to issue barring notices to Respondents. Another sample of the recommended language was attached. Subsequently, a memo was sent to AOBA members inviting them to a July 18 meeting at which Captain Mangily and counsel would discuss anticipated SEIU demonstrations. An attachment repeated and expanded on the advice offered in the June 1 memo regarding steps building owners and managers should take when confronted with SEIU activity. A third model barring letter was enclosed.

On various dates in June and July 1988, Tower, Lerner, and Lenkin were among the 26 companies that sent letters modeled on the AOBA sample to Hessey, barring activity by Local 525, or anyone connected with the Union from entering any of the premises which they owned or managed on penalty of prosecution for trespass. Hessey replied to each such letter on July 27, warning that the bans were unlawful, and urging their recision. A week later, Slatton replied on behalf of those who had issued the notices, denying that they were unlawful. Hessey sent another letter to AOBA members on August 5 which warned that by adopting the banning policy and contributing to the anti-SEIU legal defense fund, they were jeopardizing "any claim of owner 'neutrality.'" (R. Exh. 63.)

Reacting to increased picketing and handbilling activity by justice for janitors advocates, and anticipating that such activity would continue in the coming months, AOBA issued a September 2, 1988 memo to its members which described in broad strokes the distinction between lawful and unlawful picketing and handbilling. The memo advised that:

> individuals may engage in peaceful picketing, handbilling and demonstrations in public areas . . . (including) the sidewalks in front of and adjacent to office buildings . . . the public area would not normally include an office building lobby. [R. Exh. 67.]

On September 30, 1988, the SEIU filed unfair labor practices against all those who were involved in issuing the barring letters, including the Charging Parties, AOBA, the Arent, Fox firm, and the lawyers who represented AOBA. In substance, the charges alleged that the barring notice constituted an overly broad, discriminatory no-solicitation rule which banned individuals from certain premises solely on the basis of their union status or affiliation and for engaging in protected concerted activities. AOBA and counsel were accused of recommending, directing, and instructing building owners and managers to issue the banning notice.

In an effort to limit the scope of the barring notices, the charged employers advised the Respondents that they were not intended to apply to persons engaged in any activity protected by the Act. Then, in late November, in order to comply with newly issued Board law, the charged parties and other building owners sent memos, tracking another model text prepared by AOBA, to SEIU's general counsel further explaining that the barring notices were not meant to apply to janitors engaged in organizing activity during their nonworking hours. On receiving these assurances, the Unions withdrew the charges.

However, while the Unions' charges still were pending, the justice for janitors campaign filed a complaint in Superior Court for the District of Columbia alleging that the barring letters violated various provisions of the District's Human Rights Act. The AOBA legal defense fund was used to pay for AOBA's and Slatton's defense. On December 5, the Honorable Henry Kennedy granted one count of the JFJ Partial Motion for Summary Judgment, ruling, in effect, that the barring letters were overly broad.[24] Pursuant to this ruling, the AOBA building owners sent identically worded letters to the Unions entirely rescinding their barring letters.

In the interim, on November 16, AOBA issued a special "Alert" to its cleaning contractor members which was prepared by counsel on behalf of the Capitol Area Building Service Contractors, a trade association for janitorial employers in the District of Columbia. The memo indicated that union representatives were claiming that Local 525 represented a majority of the contractors' employees and were demanding that other contractors recognize and bargain with it. The memo then stressed that

> it is very important that you decline recognition you should tell the SEIU that they are free to file a petition with the National Labor Relations Board. . . .
>
> It is also very important that you do not accept any offer, to review "authorization cards," petitions, or the like. If the SEIU tries to hand you a package, you should refuse to accept it; and if it is left with you . . . it should be sent back to the SEIU unopened. (R. Exh. 70.)

At the year's end, AOBA sent its annual message to members and again proclaimed its success in the "fight to prevent the [SEIU] from organizing the janitorial workers in the District." (R. Exh. 78.)

4. 1989

As mentioned above, the SEIU continued the JFJ campaign throughout 1989 by demonstrating and handbilling outside and within various building sites in the District. AOBA, too, continued to offer advice and training to building owners and janitorial contractors who were intent on resisting the SEIU's organizational activity. Minutes introduced into evidence were heavily redacted to omit privileged material; nevertheless, the records reveal that the SEIU was a topic of discussion at each of AOBA's monthly board of directors' meetings. Lenkin, then president of the organization, attended each such meeting; but few of the officials of the other secondary and primary employers appeared on a regular basis. AOBA also continued to offer training sessions and special meetings which addressed various SEIU-related topics.[25] In summarizing its major accomplish-

[24] Judge Kennedy ruled that the barring letters not only proscribed persons connected with the JFJ campaign from entering buildings of AOBA members to engage in solicitation; they also "categorically deny entry onto AOBA members' properties to persons who are connected with the campaign. This undoubtedly has the effect or consequence of discriminating on the basis of source of income or place of business." R. Exh. 145 at 14.

[25] Based on documents and averments indicating that counsel offered legal advice throughout meetings such as those on March 23 and April

ments for the year, AOBA again claimed that it led "the office building industry's campaign to prevent union membership being forced upon janitorial workers without a federally supervised election." (R. Exh. 88; see also R. Exhs. 98 and 102.)

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### *A. Findings of Fact*

Events which occurred in October and November 1990, alleged as violations of Section 8(b)(1)(A), (4)(i), and (ii)(B), are described in chronological order below.[26]

#### 1. October 19

According to the uncontroverted testimony of the administrative assistant/receptionist, Sue Schneider, on October 19, at 12:30 p.m., a group of six men and women approached her desk in the reception area of the Lerner Corp.'s offices in the Washington Square building and asked for Property Manager Sandra Reed. When Schneider informed the group that Reed was not in, a spokesman asked to leave a letter for her. Schneider told them she would have to check with Reed's assistant, Kari Cooke, and asked the group to wait in the reception area.

When the spokesman tried to hand Schneider the letter, she recognized the JFJ logo in the corner of the envelope. As Schneider headed for Cooke's office, she became aware that the delegation was following her. She asked them to return to the reception area. Before reaching Cooke's office, she asked the group to return to the reception area a few more times. However, when Schneider entered Cooke's office, the six individuals still were behind her. Cooke also instructed them to return to the reception area, but they entered her office anyway and asked to leave the letter for Reed. Cooke declined to accept it whereupon the spokesman placed the letter on her desk and departed. The entire episode lasted less than 5 minutes. Schneider, who routinely accepted deliveries from courier services, conceded that the group behaved in a civil manner throughout the visit and that their conduct did not differ from that of other delivery persons.

The letter left on Cooke's desk was from Hessey to Reed, on stationary bearing the letterhead, "JFJ Organizing Campaign" and dated October 19. It stated that janitors in buildings on the Connecticut Avenue corridor had voted to strike "against our employer, the janitorial contractors" and appealed to "the management firm of this building . . . for your assistance in finding a fair solution to this dispute." (GC Exh. 11.)

In similar letters dated October 23, Hessey wrote to Charging Party Lenkin and the Lerner Corporation announcing the janitorial employees' decision to strike. In addition, the letter stated that the Union would hold a street meeting on October 25 at 10 p.m. outside Washington Square and advised that "As part of our preparation for the strike, we will be trained in nonviolent, civil disobedience" (which is used) "[i]n many of our strikes." (G.C. Exh. 74.)

#### 2. October 25 to 30

As Hessey had forecast, the Union held the first of a number of afterwork street gatherings in the vicinity of Washington Square on October 25. SEIU Organizer Brown testified that during these rallies, the participants discussed issues and chanted slogans such as "Justice for Janitors," and "si se puede" (yes we can). They also carried signs reading "Justice for Janitors," "Yes We Can," and "More Money." While this activity continued on October 26 and 29, the signs that were carried did not identify any company with whom the SEIU had a dispute.

Washington Square Security Chief Remick testified that on October 25, a JFJ demonstrator gave him a handbill outside Washington Square. It announced that a civil disobedience training session would be given at the intersection of Connecticut Avenue and L Streets N.W. and invited the public to attend to assure themselves that "there will be no violence." (G.C. Exh. 13.)

Remick stayed on to observe the training, and close to 5:30 p.m., saw some 20 to 25 persons gather outside WSLP chanting slogans and bearing signs that said "Justice For Janitors." Other signs were in Spanish and some, he thought, identified "USSI." As the demonstration progressed, Brown approached Remick and another security officer and said "It's a shame what Sonny Abramson and Ted Lerner are doing to these people. They are going to be sorry . . ." or words to that effect. (Tr. 104.)

Later that same evening, at approximately 8 p.m., WSLP security guard Kenneth Melvin witnessed approximately 70 persons parade in a circle outside the building while carrying noisemakers and signs. He could not clearly recall what the signs said other than "Justice For Janitors."

Melvin related that at 9:30 p.m., as the crowd was beginning to disburse, and while he was taking to Remick, Brown started walking backward in his direction. Fearing that Brown would trip over him, Melvin put his hand against Brown's back as he approached. At that, Brown accused Melvin of assaulting him. Melvin testified that when he explained that was not his intent, Brown accused him of assault and suggested, "We could take it up in the alley," or "take it up in a different manner . . . . [T]hen he . . . said that I was ignorant and that he would educate me." (Tr. 460–461.) Instructed to refrain from provoking fights or responding to provocation unless physically attacked, Melvin said he simply turned away.

On cross-examination, Melvin acknowledged that he did not mention Brown's alleged challenge to "take it up in the alley" in his Board affidavit or in contemporaneous reports he was required to file daily with his employer. Instead, Melvin's October 25 incident report shows that he wrote that when he put his hand on Brown's back, he said: "You think your a big shit with your night stick, badge and radio. I bet you just want to lock me up. Come on do it. Lock me up I dare you." (R. Exh. 22.) Melvin was not asked to explain this inconsistency, nor did Brown or Remick, who witnessed the incident, comment about it.

#### 3. October 30

Brown further testified that the Respondent began a strike on October 30 and engaged in picketing over the next 2 weeks at the Washington Square building. During this timeframe, it is undisputed that the picketers carried signs which identified various cleaning contractors, including USSI and Red Coats, but not building owners or managers.

Anthony Grigsby, a Lerner special security guard, testified that by 6:30 p.m., a group of 25 to 30 people had congregated outside Washington Square. They began marching on Connecticut Avenue carrying signs, one of which read, "How could you live off of $4.75 an hour." Grigsby was summoned elsewhere in the building but on returning to the lobby, found 10 people there who chanted: "Fired up. I can't take it no more" before they exited.

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11, 1989, I did not permit Respondents to question witnesses about them.

[26] All dates refer to 1990 unless otherwise specified.

A Local 525 handbill, dated and apparently distributed the next day, October 31, describes the previous evening's strike activity:

> Last night nearly 100 janitors cleaning 12 buildings . . . along the Connecticut Corridor struck to protest unfair labor practices by their employers. Janitors from all the buildings converged on the corner of Connecticut and L Street forming a massive picket line. During the next hour, the picketers took over building lobbies and tied up traffic . . . during rush hour. [G.C. Exh. 14.]

The handbill requested the reader to "call your building manager to assist in finding a fair resolution to this matter." Id.

4. October 31—picketing at the PMI garage

The Washington Square parking garage, which fronts 18th Street and is managed by PMI, an independent company, was the site of further SEIU activity on October 31. The garage, which offers direct access to the office building, is used both by tenants and the public at large. While USSI day-shift employees also may park at the facility and enter the building that way, as a practical matter, it is quite expensive and they have not chosen to do so.

Security Chief Remick testified that between 7:30 and 8:30 a.m., a particularly busy time of day, he and officer Melvin observed five to six JFJ advocates, including Brown, at the garage entrance. A few of them were standing by holding signs, while several others who also carried signs labelled "Justice For Janitors," took turns parading back and forth across the entrance.

Melvin estimated that 15 to 20 persons took part in the picketing. As cars approached the garage, the pickets halted in the entrance, preventing some from entering. When a few cars managed to pass by, Melvin saw Brown hit some of their rooftops with his fists. However, he failed to mention this conduct in his daily incident report.

After more than half an hour of this activity, Remick observed a white Chevrolet halt at a diagonal in the garage entrance, partially blocking both lanes. The driver, Richard Bensinger, director of the AFL–CIO's Organizing Institute, slammed the car door behind him, announcing that he had locked his keys in the car.[27] One apparently irate driver, a Secret Service agent, tried to ease past Bensinger's blockade, but in the attempt, damaged his car's fender. PMI employees were unable to remove Bensinger's vehicle until 9 a.m.

During the course of the morning's picketing, Brown approached Melvin and, with PMI employees and demonstrators nearby, told the guard that he was "losing it," that he was "ignorant" and "a crazy muscle man." (Tr. 468.) Later that day, JFJ pickets returned in force. Remick testified that at 5 p.m., a group carrying JFJ signs began to assemble. Eventually the crowd numbered close to 80. For almost an hour, the pickets paraded in a 60-foot oval on the Connecticut Avenue side of Washington Square. They then shifted to the L Street entrance for 10 to 15 minutes, accompanied by the cacophonic sounds of a bullhorn, siren, drum, and tambourine. Remick stated on direct examination that the picketing "effectively blocked" the Connecticut Avenue entrances, but on cross-examination, conceded that ingress and egress was "[j]ust difficult." (Tr. at 127.) He further acknowledged having no personal knowledge that the L Street entrance was blocked. On redirect examination, after reviewing an affidavit he gave to Arent, Fox counsel, Remick renewed his claim that the picketing "effectively blocked the entrance . . . to the building." (Tr. at 286.)

In identical letters dated October 31, Hessey wrote to investors and partners of the Lenkins informing them that janitors who worked in Lenkin-owned and other downtown buildings had walked off their jobs to protest their working conditions. The letters pointed out that although building owners did not employ the janitors, "they can and often do exercise control over their conditions of employment." (E.g., GC Exhs. 22 and 70.) Hessey then appealed to the coinvestors to persuade Edward Lenkin to secure living wages for the janitors. Id.

5. The events of November 1

*(a) The trashing incidents and alleged assaults*

Beginning on November 1, the Respondents accelerated the JFJ campaign and initiated a number of highly visible, publicity generating actions. The record clearly shows that one of these events resulted in assaults on supervisors and a retail customer at Washington Square.

The incident began at noon with 50 to 60 individuals picketing in front of Washington Square. As the picketing progressed, Security Chief Remick observed one of the pickets grab bulky black plastic trash bags from a truck parked close to the Connecticut Avenue entrance, and hand them to other protesters. This group then entered the retail lobby and headed toward a bank of glass doors leading to the tenants' elevator lobby. In hot pursuit, Remick attempted to prevent three women demonstrators from entering the inner lobby. As he reached out to block the door, or perhaps seize a sack, one of them punched him in the face. Property Manager Reed, who was on the interior side of this same bank of doors was struck in the face by a bag which a demonstrator was pushing through the door. Reed was jarred by the impact and sustained a lump on her forehead.[28]

At much the same time, other pickets entered the lobby. Some were carrying signs and chanting slogans; others also had trash bags which they flung about. Many of the bags split open when they hit the ground and shredded newspaper scraps spilled out, cluttering the lobby. Although Remick did not see anyone actually throwing the bags over a railing, some did fall to the lower lobby. Many of these sacks also tore apart, and their contents were scattered about, with some of the material drifting into an artificial pond. One of the falling bags grazed a woman's head as she was entering a shop on the lower level.

Shortly after Washington Square was trashed, SEIU demonstrators engaged in similar activities at 1130 and 1133 Connecticut Avenue buildings which were cleaned by Red Coats janitors. According to eyewitnesses, 20 to 30 demonstrators, 1 of whom wore a JFJ T-shirt, entered the building at the 1130 address; another 10 to 15 persons wearing business clothes and carrying signs, rushed into the lobby at 1133 Connecticut Avenue. Both sets of demonstrators tore open plastic garbage bags, dumped the contents—newspaper strips—in the lobbies and left after 5 minutes. Jill Bussey, concierge at the 1133 address,

[27] The parties stipulated that Bensinger was acting as Respondents' agent on October 31 when he parked and locked a car at the entrance to the WSLP garage during the course of the above-described picket line activity, thereby impeding access to and from that facility. (Jt. Exh. 1.)

[28] Minor and quite natural discrepancies exist between Remick's and Reed's accounts of this fracas, but I do not find that this undermines their credibility.

testified that following the demonstration, "JFJ" stickers were found affixed to the lobby walls.[29]

The property managers for the 1130 and 1133 buildings testified that in the fall of 1990, Red Coats janitors worked from 6 to 10 p.m. However, they had no personal knowledge as to whether this schedule actually was followed. They also acknowledged that Red Coats maintained offices in each of the buildings. While Red Coats had unrestricted access to their office at the 1130 building, the property manager at 1133 instructed the Red Coats firm in a November 8 letter, "that cleaning services are to be provided between the hours of 6:00 p.m. and 11:00 p.m." and that "Red Coats employees are not to be in the building prior to or after the above hours." (R. Exh. 19.)

Some time after these trashing incidents occurred, Stephen Lerner, SEIU International building trades director and a participant in the planning meeting leading to those demonstrations, was interviewed for National Public Radio. Among other comments he said, "Everybody wants to pretend janitors don't exist, they come at night, little mysterious people and everything is clean in the morning. What we do is put it right back in people's face. They can't ignore that these folks are treated this way. . . . [W]hat we find again and again is that the tenants are upset by it. Many are sympathetic and they say to their building owner, we want this settled." (Tr. 1017–1019.)

At the hearing, Lerner testified that the foregoing quote was part of a generic discussion not specifically addressed to the trashing episodes. Instead he maintained that the trashings were designed as symbolic protests against the contractors, not the building owners, to "build public support and . . . awareness about our activity." (Tr. 1022.)

When asked if the part of the SEIU's plan was to spread the trash around the lobby, Lerner answered, "No . . . the plan was we purposely took clean newspaper and put it in garbage bags . . . was not involved in any discussion about spreading it around. The idea was to place the bags." (Tr. at 1022–1023.)

Although the SEIU may not have formed a premeditated plan to scatter the contents of the trashbags, the fact is that the bags opened either inadvertently or purposely. It is illogical to assume that the Charging Parties at three separate locations suddenly and simultaneously conceived of a plot to rip open the bags in order to blame the resulting damage on the Respondents. Moreover, Lerner was not in any of the buildings when these events occurred and thus could not contradict the testimony of a number of eyewitnesses or the concrete evidence of the trashings provided by photographs.

*(b) Evening demonstration at Abramson's home*

The Respondents brought the JFJ campaign to Albert Abramson's doorstep on the evening of November 1. Abramson, one of Washington Square's owners, testified that at around 7 p.m., while he, his son Gary, and another guest were at his home in Bethesda, Maryland, he heard a commotion at the door. On looking outside, he saw a crowd of approximately 50 people milling in his circular driveway and on the street chanting slogans. Another group of six were at his front door. Abramson did not open his door to the callers. Instead, he called the police who responded promptly and herded all of the demonstrators to the street. When Abramson left his home 30 to 45 minutes later to attend a concert, his driveway was not blocked.

The demonstrators left a letter for Abramson which repeated a familiar theme; that is, although janitors were striking against the unfair labor practices of their contractor employers, they wanted to meet with him because "Even though you are not our employer, we know that you can assist in resolving these problems. . . . Like (other named building owners), you control the amount of money available for janitorial services. They chose to make changes by announcing their neutrality to our organizing efforts and making more money available for janitorial services." (GC Exh. 80.)

A handbill, apparently intended for distribution to Abramson's neighbors, also was left at his home. It stated that janitors who were striking over low wages paid by cleaning contractors, worked at buildings such as Washington Square "which Sonny Abramson, your neighbor owns." (GC Exh. 20.) The leaflet asked, "Why would Sonny Abramson employ a contractor that the Federal Government alleges violates workers basic rights to organize" and urged the reader to ask Abramson why he did not support justice for janitors. Id.

6. November 2

Tower Construction, an Abramson-owned limited partnership, contracted with USSI for janitorial services at a building it managed at 1707 L Street N.W. The building's garage was separately managed by Monument Parking and cleaned by its own parking attendants. At 7:30 a.m. on November 2, a group of five or six people with signs which the garage supervisor thought said, "Justice for jobs," "We can't live off of $4.70 an hour," began walking back and forth across the garage entrance. Their walk slowed to a virtual halt whenever a car approached and although most cars were able to enter the garage, a few chose to drive on. Once, when a motorist shouted something to the pickets, one of them yelled back, "call management." The garage supervisor summoned the police but the pickets had departed by the time they arrived.[30]

On the evening of November 2, a group of 40 to 50 demonstrators targeted a building at 2301 M Street N.W. in which the Lenkin family had an ownership interest. SEIU Organizer Brown acknowledged that he knew janitors working at this building were not involved in a strike. At the start of the demonstration around 7:30 p.m., Brown tried to leave leaflets concerning the JFJ campaign inside the front door of the building which was part residential, part commercial, but found it closed. He maintained that the demonstrators, who marched single file, 2 to 3 feet apart at the building, were not engaged in picketing.

A security guard at the 2301 M Street building testified that the demonstration was a noisy affair, lasting 20 to 30 minutes. He saw demonstrators carrying JFJ placards, pounding on cans, shouting chants, and calling out "Down with Eddie Lenkin."

[29] Bussey failed to mention the stickers in a report to the building's property manager. However, videotapes of the lobby taken just after the incident show JFJ stickers mounted on the walls. It is improbable that anyone but JFJ supporters put them there. I further conclude that Bussey's failure to recall whether she was given instructions regarding the JFJ campaign was due to a simple lapse of memory.

[30] Respondents suggest in their brief that no evidence connected the SEIU to this demonstration. Respondents apparently demand a more exacting standard of proof than is required in administrative litigation. In the circumstances present here, it is fair to infer that the garage supervisor, who had no prior exposure to the JFJ campaign, mistook or misread justice for janitors signs for ones which he thought said "Justice for jobs." From this, I further infer that the demonstrators were involved in Respondents' organizational drive.

7. November 6

JFJ demonstrators appeared unannounced at Lenkin headquarters in Bethesda, Maryland, in midafternoon on November 6. Property Manager Lorraine Flenner testified that she was in a second floor office on that date when an unknown woman walked in unexpectedly and thrust handbills at her and a colleague. Flenner told the woman she did not belong there; that she was in a private office. Others also told the woman to leave, but she ignored their remarks and continued to deposit flyers in other offices. After Flenner telephoned the police, she learned that another woman had placed handbills in a first floor restroom. The incident lasted no more than 10 to 15 minutes.

The handbill left at the Lenkin facility on that occasion contrasted the poverty level wages and employment conditions of janitors with the wealth of office building landlords and concluded with a plea to hold developers "accountable for the financial impact they have on city residents—including the way they treat janitors." (GC Exh. 25.)

On the same day, Respondents distributed leaflets outside Washington Square announcing that the strike would continue and that strikers and supporters would "stage another march and rally with non-violent civil disobedience" at noon on March 8 at Connecticut Avenue and L Street. The leaflet did not identify an employer, but asked tenants to "call your building manager and . . . clean out injustice." (GC Exh. 16.)

In an effort to limit the scope of the Respondents' JFJ campaign, WSLP counsel wrote to the SEIU's general counsel on November 7 that USSI employees would not be scheduled to work at Washington Square between the hours of 4 and 10 p.m. The letter also stated that the entrances to Washington Square, reached through an alley at Connecticut and K Street, would be reserved for USSI employees, suppliers, and agents so that picketing at other times or at other entrances would be regarded as evidence of the SEIU's unlawful secondary objective.

In addition to the November 7 notice, Washington Square Property Manager Reed testified that a USSI official advised her that the janitors' hours would change from the current 6 p.m. to midnight schedule to 10 p.m. to 4 a.m. sometime in November. Two weeks later, Reed was advised that the hours again would be altered to extend from midnight to 6 a.m. Although Reed did not personally observe janitors working during these hours, she explained that she relied on the information given her to advise tenants and security guards, who were responsible for giving the janitors keys to the various offices, of the revised schedule.[31] One such guard, Kenneth Melvin, whose night shift began at 6 p.m. during the period in question, indicated that in October, the janitors completed their shifts at 11 p.m. but some time thereafter, their hours were changed so that they left the building at 6 a.m.

Notwithstanding the notice of new shift hours, Local 525 and USSI employees engaged in picketing at Washington Square from November 7 to 15, beginning at around 6 p.m.[32] Thus, security officer Melvin, who worked a 3 to 11:30 p.m. shift, testified that on November 12, 13 to 18 people, some of whom carried JFJ placards, gathered at 6 p.m. in front of the building, and circled for a half hour. They departed, but reappeared in short order; chanting slogans as they snaked through the lobby from the L Street door to the Connecticut Avenue exit. Another security officer, Grigsby, recalled this event somewhat differently. He thought that 25 to 30 people were involved in the November 12 picketing; that they left for half an hour and on returning, remained in the lobby for 5 to 10 minutes. These few inconsistencies do not alter the fact that there were at least 13 individuals picketing outside Washington Square at 6 p.m. in the evening; that they left for some uncertain period of time, and on their return, marched through the lobby for a period of time that could have been as brief as 3 minutes or as long as 10 minutes. The same officer observed close to 100 people, some with JFJ signs, picketing outside the building at 5 p.m. the following day.

8. November 8

*(a) The handcuffing incident*

Respondents engaged in two new publicity-garnering activities on November 8. The first began shortly before noon when a group of 60 or more persons wearing business suits or JFJ jackets began chanting and parading in an oval on both the Connecticut Avenue and L Street sides of Washington Square. Because of the large number of persons taking part in the demonstration, some pedestrians walked in the street, a somewhat hazardous undertaking given the amount of traffic in the area at the noon hour.

As the picketing continued, approximately 10 demonstrators sat down in 2 separate entrances to the facility and handcuffed themselves to each other while the 2 end persons also handcuffed themselves to the doors, thereby effectively blocking access to the building through those portals. However, two other entrances, one at the corner of Connecticut Avenue and L Street, and the other on L Street were unimpeded. The police eventually removed the demonstrators and arrested them after severing their handcuffs with boltcutters.

Union leaders testified that Washington Square was selected as the site for the handcuffing because such activity at a prominent location was certain to attract public attention. Stephen Lerner denied that the act of civil disobedience was directed at the building owner. However, the following day, Respondents distributed a flyer which announced the arrests followed by the comment that "[t]he cleaning contractors and the building manager appear to be unwilling to insure that the janitors are treated fairly." (G.C. Exh. 17.)

*(b) The Aspen Hill Athletic Club episode*

The Aspen Hill Racquet Club and Fitness Center, located in Silver Spring, Maryland, is owned in part by the Lenkin family. The club's fitness director, Kevin Sweeney, testified that on the evening of November 8, when he went to the fitness center located on the lower level of the two-story building, he saw six people standing on the oval track passing out leaflets to patrons. Perhaps a half-dozen club members were trying to use the 4- to 5-foot wide track at the time. Sweeney stated that several of the joggers felt compelled to leave the track to avoid the handbillers and by so doing, were forced toward an area where some construction was underway. After identifying Lenkin as "a major owner of this club," the handbill explained that:

> Janitors cleaning his buildings work for cleaning companies who pay minimum wage with few if any benefits. In fact,

[31] Reed's testimony regarding the altered working times for the janitors was admitted not for the truth of the matter, but to show the actions she took in reliance thereon.

[32] Responding rather quickly to a question on cross-examination, Hessey appeared to suggest that he participated in picketing every evening from November 8 and 15 at approximately 6 p.m. On closer examination, he may have meant that on each occasion that picketing took place between November 8 and 15, he was present.

> some of janitors [sic] cleaning his building are strike [sic] against the cleaning companies they work for. While Lenkin is not the janitors [sic] employer, he has the power to hire cleaning companies who will respect the janitors' rights and pay decent wages with benefits.

Sweeney asked the group to leave. Although they left the track promptly they only agreed to move upstairs. On moving up to the floor, Sweeney found another 30 to 40 people distributing flyers.[33] He again asked them to leave. Identifying himself as the group's leader, Kevin Brown told Sweeney that if he had any concerns he should speak with "Eddie Lenkin," a name that meant nothing to Sweeney at the time. Brown also asked Sweeney for information about club membership. After hearing Brown warn a staff member that he would take legal action if he failed to provide his correct name, Sweeney instructed an employee to telephone the police. While Sweeney and Brown were talking, the JFJ supporters continued to distribute leaflets. After about a half hour, and a third request by Sweeney that they leave, the JFJ protesters left the building and headed for a waiting van and bus. Some of the demonstrators shouted taunts at a few employees who had accompanied Sweeney outside, and then began to run toward the Club's front entrance. Fearing that a fight might break out, Sweeney asked Brown to intercede but he declined to do so. The group left shortly after the police arrived.

9. November 14—a second protest at Albert Abramson's home

On November 13, WSLP filed the charges giving rise to the instant litigation, and on the same date, moved for a temporary restraining order in D.C. Superior Court to enjoin Respondents' activities at the Washington Square building. On November 14, JFJ advocates staged a second demonstration at Albert Abramson's home.

That evening, at 7:30 p.m. on hearing noise outside his home, Abramson saw a group of approximately 50 persons in the street parading 3 to 4 feet apart while holding lighted candles and chanting slogans, at the direction of someone with a bullhorn. They carried no signs and did not set foot on his property. Stephen Lerner had given the police advance notice of the vigil and they were at the scene until the vigil ended some 15 or 20 minutes later.

A handbill was left at Abramson's home which accused him of "reaping tremendous profits at the expense of janitors cleaning office buildings he owns." (GC Exh. 21.) While the statement noted that USSI, not Abramson, was the janitors' employer, it nevertheless pointed out that "he has the power to hire cleaning companies who pay decent wages with benefits." Id.

10. November 15—The invasion of Arent, Fox

Pursuant to Respondent's request, International President Sweeney, Research Director Chu, and Service Division Organizing Director Lerner met with Edward Lenkin and Arent, Fox counsel at 9 a.m. in a downtown Washington, D.C. club. After an unproductive discussion in which Lenkin was urged to support the JFJ campaign to no avail, Sweeney stated that he did not believe the parties were making progress, and the SEIU delegation departed.

Several hours later, Chu joined some 50 other persons in a picket line at Washington Square. After patrolling for a half hour, he and others on the line entered the lobby and took the stairs to the fourth floor, the first of three floors which housed the Arent, Fox law firm. Harriet Dunbar, the firm's fourth floor receptionist, testified that a woman approached her desk and asked to distribute leaflets. Dunkar denied her request. Moments later, Chu and approximately 15 to 20 others, reached the receptionist's desk, and, on asking if they could distribute handbills, met with the same response. Chu then asked to see Alan Siegel and Joanne Ochsman, the attorneys with whom he had met earlier that day, and was told they worked on the sixth floor.

The demonstrators proceeded to the fifth floor and wandered around. They then mounted an internal staircase to the sixth floor where they asked an attorney where Siegel's office was located. The firm's office manager, Robert Thatcher, approached the group and asked them to wait at the sixth floor reception area. After this request was repeated three or four times, the group slowly made their way back to the reception area, but on their way, continued to seek Siegel, calling out his name in a sing-song manner.[34]

As the group passed a conference room, one of them opened the door and asked for Siegel. A demonstrator again opened the door to another, larger conference room in which six people were seated, and asked for Siegel. An attorney in the room ordered the intruders to leave. They obeyed just as the special police arrived.

On the same date, Sweeney sent a letter to the Lerners and Abramsons, and urged them, as owners of the building which contracted with USSI, to use their good offices "to facilitate a resolution of our dispute." (GC Exh. 36.)

11. November 16—The trip to Ronald Abramson's home

At 8 p.m. on November 16, Ronald Abramson's housekeeper, Norma Espena, answered the doorbell to find Kevin Brown there with three other individuals and another 40 to 60 demonstrators nearby in the street. When Brown asked to speak with Abramson, Espena said he was not home and called to Ronald's 9-year-old son, Jordan, who joined her. Brown explained to the youngster that the people with him worked at buildings in which his father had an interest and explained he wanted to speak with him. Jordan suggested that Brown talk to his father at the office. Brown then handed a leaflet to Espena which bore the following bold headline: "Responsible Neighbor or Greedy Exploiter." Like some of the other JFJ literature, the sheet stated that while Abramson is not the janitors' employer, he has the power to hire cleaning companies who will pay decent wages and obey the law." (GC Exh. 34.)

Jordan insisted that Brown should talk to his father at the office and grabbed the leaflet from Espena. He read it, and according to the housekeeper, began to tremble. Other demonstrators joined Brown at the doorstep, but at Jordan's insistence, Espena shut the door and turned on a burglar alarm. Before departing the area, JFJ supporters distributed copies of the leaf-

[33] The handbill, titled, "Lenkin Squashes Janitors Rights," stated that Melvin Lenkin, "a major owner of this club," was using "high-priced lawyers to deny janitors cleaning many of his downtown office buildings their basic rights." (C. Exh. 31.) While making it clear that Lenkin was not the janitors' employer, the leaflet asserted that "he has the power to hire cleaning companies who will respect the janitors' rights and pay decent wages with benefits." Id. Lastly, the reader was urged to telephone Lenkin if he or she "was concerned that the fees you pay to this club could be increased to pay for Lenkin's attempts to deprive janitors of their basic human rights." Id.

[34] Siegel and Ochsman were in superior court that day on WSLP's motion for a temporary restraining order.

let which Jordan had read to the Abramson's neighbors. Espena testified that Jordan was upset for several hours following this encounter.

## IV. THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT ARE GRANTED

### *A. The Respondents' Affirmative Defenses*

In answering the complaint, Respondents raised affirmative defenses based on their contention that the Charging Parties were not neutrals under Section 8(b)(4) because of actions they took as members of AOBA.[35] Prior to the start of the hearing, the General Counsel and the Charging Parties moved to dismiss the defenses, asserting that they were deficient as a matter of law and, therefore, could not protect the Respondents from liability for violating the Act.[36] I denied the motions with leave to renew at the close of Respondents' case-in-chief. Pursuant to that ruling, the Charging Parties and the General Counsel moved for summary judgment as to the following affirmative defenses which turned on the Charging Parties' membership in AOBA.[37]

> 3. WSLP, separately, and through all of some of its principals, and its principals, have engaged in a joint venture or alliance with USSI, both through the Apartment and Building Owners Association ("AOBA"), and otherwise, to oppose the unionization of janitors by Respondents, or either of them, in the metropolitan Washington D.C. area and have thereby forfeited any claim to neutral status.
>
> 4. Lenkin, separately and through its principals, have engaged in a joint venture or alliance with Red Coats, both through AOBA and otherwise, to oppose the unionization of janitors by Respondents, or either of them, in the metropolitan Washington, D.C. area and have thereby forfeited any claim to neutral status.
>
> . . . .
>
> 6. Lenkin, WSLP and/or their principals, acting separately and through AOBA, have enmeshed themselves in the dispute that Respondents, or either of them, have with janitorial contractors, including Red Coats and USSI in the metropolitan Washington, D.C. area and thereby forfeited any claim to neutral status.[38]

In substance, Respondents contend in affirmative defenses three, four, and six, that the Charging Parties are not entitled to neutral status because under AOBA's auspices, WSLP and Lenkin engaged in a collaborative effort with the primary contractors, USSI and Red Coats, to oppose union representation of their janitorial employees. By so doing, WSLP and Lenkin enmeshed themselves in the primaries' disputes and thereby forfeited their claim to neutrality as secondary employers protected by Section 8(b)(4)(B) of the Act.[39] In short, Respondent defends its allegedly unlawful conduct on the grounds that it picketed or demonstrated against no one except primary employers.

### *B. Procedural Posture of the Motions to Dismiss*

In presenting the "AOBA" defenses as framed by paragraphs 3, 4, and 6, Respondents specifically disavowed reliance on either branch of the well-established ally doctrine.[40] Nevertheless, in their original motions to dismiss, Charging Parties and the General Counsel argued that an asserted neutral employer may lose its neutrality only if it is an ally; that is, an employer "Whose neutrality is alleged to be compromised by the performance of 'struck work'; [or] . . . who is claimed to be so closely related to the primary employer that the two constitute a single employer or single enterprise." *Mine Workers (Boich Mining),* 301 NLRB 872 (1991), enf. denied 955 F.2d 431 (6th Cir. 1992) (accord: *Teamsters Local 560 (Curtin Matheson Scientific),* 248 NLRB 1212, 1213 (1980)).

I denied these motions to dismiss without prejudice, finding no precedents which supported the proposition that the ally

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[35] Sec. 8(b)(4)(B) reads:

> (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 an 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 the 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.

[36] The Charging Parties initially moved to dismiss affirmative defenses two through six whereas, the General Counsel's motion was confined solely to affirmative defenses three, four, and six.

[37] In fact, Charging Party WSLP was not an AOBA member. However, for the purposes of this argument, WSLP partners, Lerner and Abramson (through Tower), were members, and, therefore, will be treated as synonymous with WSLP.

[38] Respondents' second and fifth affirmative defenses, set forth below, turn on the well-established theory that the Charging Parties were joint employers with the USSI and Red Coats and, thus, were not immune from primary picketing. This defense is examined in sec. II of this part.

> 2. WSLP, or its principals, exercise sufficient control over, and are sufficiently involved in, the performance of janitorial duties at 1050 Connecticut Avenue, N.W., Washington, D.C. by employees being paid by USSI to forfeit any claim to neutral status.
>
> . . . .
>
> 5. Lenkin, or its principals, exercised sufficient control over, and are sufficiently involved in, the performance of janitorial duties by some employees being paid by Red Coats to forfeit any claim to neutral status.

[39] Sec. 8(b)(4) does not use the term "neutral," Rather, it has been defined by case law as a word of art applicable to the employer "who is not involved in a labor dispute with his immediate employees over . . . issues directly affecting the terms and conditions of employment of his own employees . . . [and] is not in a position *legally* to grant the union's organization or economic demands." (Emphasis in original.) *A.C.E. Transportation Co.,* 120 NLRB 1103, 1108–1109 (1958).

[40] The ally doctrine, pursuant to which employers may be found unentitled to neutral status, has developed into two branches: "one involving cases where an employer's neutrality was alleged to be compromised by his performance of 'struck work,' and another involving cases where neutrality was contested on the ground that the boycotted employer and the primary employer were a single employer or enterprise." *Curtin Matheson Scientific,* supra at 1213.

doctrine was the exclusive means by which a respondent could attack the asserted neutrality of a secondary employer. Indeed, language in several cases suggests that under certain circumstances, a secondary employer can be stripped of the protection afforded to a neutral under Section 8(b)(4) even in the absence of an ally relationship with the primary. See, e.g., *Curtin Matheson Scientific,* supra at 1214, where the Board observed that "the question of neutrality 'cannot be answered by the application of a set of verbal formulae. Rather the issue can be resolved only by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer.'"[41] *Acme Concrete & Supply Corp.,* 137 NLRB at 1324 "We need not here determine whether the relationship . . . is one of 'single employer' or 'ally.' It is sufficient that Acme and Twin County have such identify and community of interests as negative the claim that Acme is a neutral employer." Although the facts in these cases and their holdings are not analogous to the unique circumstances presented in the instant case, dicta indicates that the Board is more concerned with examining the real relationships among the parties in light of the statute's underlying purposes than it is with clinging to rigid rules of analysis.

If the ally doctrine is not the only basis for losing neutral status, as the foregoing cases suggest, the question which follows is, then, what evidence will suffice to warrant forfeiture of an asserted neutral's neutrality? As the Charging Parties contended in their post-trial Motion for Summary Judgment, a review of the applicable case law compels the conclusion, that even short of proof that an ally relationship exists, a respondent still must demonstrate that the secondary employer exercises substantial, actual, and active control over the working conditions of the primary's employees. In accordance with the General Counsel's and Charging Parties' arguments in their Motions for Summary Judgment, I am constrained to conclude that there is insufficient evidence here to prove that the Charging Parties exercised the requisite degree of control over the employment conditions of the primary's employees, through AOBA, or otherwise.

### *C. The Applicable Case Law*

The extensive control a secondary employer must exercise over a primary before the Board and the courts will find a loss of neutrality is clearly revealed in the history of the *Sears, Roebuck* case. *Carpet Layers Local 419 v. NLRB,* 429 F.2d 747 (D.C. Cir. 1770), remanding 176 NLRB 876 (1976), on remand 190 NLRB 143 (1971), affd. 467 F.2d 392 (D.C. Cir. 1972). Sears sold carpeting at a price which included installation costs, arranging for installation with small businesses at Sears' expense. Sears prepared cost estimates and installation plans which it assigned to designated installers who operated out of separate locations under their own names. The installers were wholly responsible to customers for defective work, set their employees' wage rates and work schedules, negotiated installation prices with Sears at arms' length and worked for other than Sears' customers. Neither they nor their workers were subject to Sears' personnel regulations or benefit programs. Concluding that the union, which had picketed Sears as part of its effort to organize one of the installers, had engaged in secondary conduct, the Board found that the installers were independent contractors and that Sears was not "sufficiently related to [them] to destroy its neutrality."

On review, the court of appeals first noted that Sears' lack of control over the installers' labor policies; including fundamental employment factors such as wages and working conditions and whether the union was to be recognized, was not conclusive of its alleged neutral status. The court then observed that Sears had a direct economic interest in the installers' unionization because it profited from the installations as well as its carpet sales and remanded the case to the Board to reexamine whether the independent installer contractors "stand in such a business relationship with Sears as to require" a finding that a labor dispute with the installers could justifiably include Sears as a primary employer. *Carpet Layers Local 419 v. NLRB (Sears, Roebuck),* 429 F.2d 747, 754 (D.C. Cir. 1970).

On remand, the Board reaffirmed its original decision and this time, the court of appeals granted enforcement. 467 F.2d 396 (D.C. Cir. 1972). Adopting the Board's statement of relevant facts as summarized above, the court in *Sears II,* agreed that the installers were independent contractors, a factor, which while not dispositive, was viewed to have

> great importance in determining the issue of "secondary/primary" status under section 8(B)(4)(B), if for no other reason than the fact that the factors on which the independent contractor finding rests demonstrate that one party does not exercise control over the other in significant respects.

Id. at 399. The Board and the court relied on other indicia of the installers' independent contractor status, including the fact that they could and did turn down work for Sears and performed work for that company's competitors, as evidence that Sears' "control over the independent operations of the installers are not so pervasive, nor is the economic interdependence such that Sears should be regarded as a 'primary'." Significantly, the court pointed out that other independent contractor relationships, "e.g. maintenance or janitorial work—might be closely analogous to the Sears-installers relationship" and that "such relationships were ordinarily intended to be considered 'secondary' for section 8(b)(4)(B) purposes." Id. at 405 fn. 38. If this was not the general rule, then all subcontractor relationships might result in the loss of neutral status.

In *Sears*, as in the instant case, the union stressed the secondary employer's real power over the wages and working conditions of the primary employees, rooted in its controlling the fees paid to the installers. However, the Board and the court rejected the notion that these economic realities negatived Sears' neutrality, as that term has been construed under the statute. While acknowledging that Sears would be "concerned with whether those installers join a labor organization, insofar as such circumstances might affect the fees" they charged for their services, the court observed that a union would not attempt to pressure another employer which was "wholly unconcerned and unconnected with the party with whom it had its dispute" Id. at 401 fn. 19. Consequently, the court reasoned that "something more than mere economic interdependence between two parties is required before one loses its secondary status with respect to the labor disputes of the other." Id. at 401. Accordingly, notwithstanding Sears' interest and involvement in the installers' economic affairs, the court concluded that Sears' control and economic involvement was such that it could "meaningfully accede to all of the Union's demands only by ceasing to do business with the installers." Id. at 406. In reach-

[41] Quoting *Vulcan Material Co. v. Steelworkers,* 430 F.2d 446, 451 (5th Cir. 1970), cert. denied 401 U.S. 963 (1971).

ing this conclusion, the court evidently rejected a literal construction of the words "wholly unconcerned," which Senator Taft used to describe the neutral employer during the legislative debate on Section 8(B)(4).[42] Sears obviously was not wholly unconcerned; yet, within the legal context, it was deemed a neutral.

In fact, even before the *Sears* cases, the Board and the courts agreed that strong economic interdependence between secondary and primary employers, without proof of other substantial connections between the two, would not defeat the protection that Section 8(b)(4)(ii)(B) affords a neutral. See, e.g., *J. G. Roy & Sons Co. v. NLRB,* 251 F.2d 771 (1st Cir. 1958); *Los Angeles Newspaper Guild Local 69 (San Francisco Examiner),* 185 NLRB 303 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972). For example, in *Retail Clerks Local 1001 v. NLRB,* 627 F.2d 1133, 1138 (1979),[43] the court affirmed the Board's decision that the Safeco title insurance companies were neutrals in a labor dispute between a title insurance underwriter and the union, even though the underwriter supplied virtually all Safeco's business, owned stock in that firm, and had common officers. The court found that notwithstanding these significant economic ties, the evidence did not show "actual or active common control . . . as to denote an appreciable integration of operations and management policies."[44] See also *NLRB v. International Board of Electrical Workers,* 542 F.2d 860, 865–866 (2d Cir. 1976).[45]

While "all strands of mutual interest" between a secondary and primary employer are considered in evaluating neutrality,[46] the Board often accords principal (albeit, not dispositive) weight to one factor—that is, the extent to which the secondary exercises active and actual control over the daily labor relations of the primary. Thus, in *Electrical Workers Local 2208 IBEW (Simplex Wire)*, 285 NLRB 834, 838 (1987), the Board ruled that the parent, company of a wholly owned subsidiary did not forfeit its neutral status although it served as the subsidiary's banker, made benefit packages available to its employees, approved its final budgets, was advised about its collective-bargaining proposals, and approved a prior labor agreement, where, inter alia, the subsidiary was controlled by a president who had final authority for its affairs, including labor relations, on a day-to-day basis. *Carpenters*, supra, 301 NLRB 410, exemplifies the same principle. There, the Board held that a union which struck a wholly owned corporate subsidiary did not violate Section 8(b)(4)(i) and (ii)(B) in picketing a sister subsidiary, where the parent, company's vice president of operations actively controlled the labor relations of both subsidiaries, was deeply involved in collective bargaining, and approved the decision to transfer replacements to the struck facility from another corporate entity unaffected by the strike. (Id. at 426). See also *Mine Workers (Boich Mining)*, 301 NLRB 872, 873 fn. 11 (1991) ("nature of the day-to-day operations and of the labor policies of the two entities are of paramount consideration. . In fact . . . the most important factor may be centralized control of labor relations.). Ultimately, this "issue can be resolved only by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer. *Curtin-Matheson*, supra at 1214.

### *D. Application of Precedents to Facts Bearing on Motion to Dismiss*

Unlike the factual circumstances involved in the foregoing precedents, the Charging Parties and janitorial contractors in the case at bar were not linked by ties of common ownership. However, the Respondents submit that the parties had an equally compelling alliance: the asserted neutrals, WSLP and Lenkin, and the primary employers, USSI and Red Coats, were united by virtue of their active participation in an AOBA-coordinated campaign designed to thwart SEIU's organizational goals. In other words, Respondent contends that AOBA acted as the Charging Parties' and primary employers' authorized agent, thereby binding them in a common effort to oppose the union's efforts to win voluntary recognition. To put it still another way, through AOBA, the Charging Parties were "in cahoots" with the primary employers, and not "helpless victims of quarrels that do not concern them at all." *Production Workers Union of Chicago v. NLRB*, 793 F.2d 323, (D.C. Cir. 1986) (citations omitted).

As proof that AOBA acted in an agency capacity for the Charging Parties, Respondent notes that Lemkin, Lerner, and Schneider (representing Tower) specifically adopted the resolution which initiated the countercampaign. As president of AOBA, Lenkin solicited contributions to the SEIU Legal Defense Fund and authored other letters to AOBA members regarding the Association's countercampaign. The asserted neutrals and the primary employers, among others, contributed to the SEIU legal defense fund, relied on Arent, Fox as their legal representative in SEIU-related matters, and implemented AOBA-recommended actions, including the issuance and retraction of letters barring the Unions' access to their various buildings.

Respondents further submit that the neutrals were aware that the janitorial companies with whom they did business were involved in the countercampaign since representatives of the Charging Parties and the secondary employers attended the same training meetings which addressed Union-related issues and relied on the same lawyers for advice in dealing with the SEIU. Consequently, by authorizing AOBA to act on their behalf in SEIU-related matters, and by taking similar actions pursuant to AOBA's recommendations, they were acting in concert to pursue a common objective.

Under well-established Board law, and in accordance with Section 2(13) of the Act,[47]

[42] 93 Cong.Rec. 4198, II Legislative History of Labor-Management Relations Act, 1106 (1947).

[43] Reversed on other grounds 447 U.S. 607 (1980).

[44] Quoting *Television Artists AFTRA v. NLRB,* 462 F.2d 887, 892 (1972), and *Teamsters Local 639*, 158 NLRB 1281, 1286 (1966).

[45] The Board's actual control test has been applied as a predicate to finding loss of neutrality in cases involving common ownership of two employers. *Teamsters Local 639 (Poole's Warehousing),* 158 NLRB 1281, 1286 (1966), *Los Angeles Newspaper Guild Local 69 (San Francisco Examiner),* 185 NLRB 303 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972). As explained *in Teamsters Local 560 (Curtin Matheson Scientific),* 248 NLRB 1212, 1213 fn. 8 (1980), the actual control doctrine stemmed from the Board's recognition that potential control is inherent in every situation involving common ownership. Consequently, unless common ownership is coupled with other attributes of integration, that factor alone might be the basis for finding a loss of neutrality, a consequence the Board is unwilling to endorse. Accord: *Carpenters (Missoula White Pine Sash),* 301 NLRB 410, 426 fn. 8 (1991).

[46] *Curtin Matheson,* supra at 1214.

[47] Sec. 2(13) states:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible

> [a] principal may be responsible for the act of his agent within the scope of the agent's general authority or the scope of his employment even though the principal has not specifically authorized . . . the act. It is sufficient if the principal empowered the agent to represent him in the general area in which the agent acted.

*Holiday Inn-Glendale*, 277 NLRB 1254, 1261 (1985).[48] Although agency questions typically arise in cases where the Board is assessing employer liability for the acts of others, there is no reason not to apply that doctrine here in determining whether the Charging Parties surrendered their neutrality by endorsing and participating in the AOBA-directed countercampaign. While it is true that AOBA was a voluntary trade association whose members were not obliged to accept its policies and practices, the Charging Parties affirmatively chose to embrace and consistently implemented AOBA's recommended strategies vis-a-vis the SEIU. Thus, they voluntarily "were acting in concert in pursuit of a common objective." *Hodcarriers Local 300 (Fiesta Pools)*, 145 NLRB 911, 917 (1964). Consequently, they may be held responsible for AOBA's conduct in so far as the JFJ campaign was concerned, as long as the Association's representatives were acting within the zone of their apparent, authority. See *NLRB v. Teamsters Local 815 (Montauk Iron)*, 290 F.2d 99, 103 (2d Cir. 1961).

The question which follows is whether the actions taken by the Charging Parties as participants in the AOBA-led campaign were such as to lead to a loss of neutrality. In answering this question, Respondents might have come within the ambit of established 8(b)(4)(B) case law had they adduced convincing proof that WSLP and Lenkin, through AOBA's agency, or otherwise, were so involved in, or exercised such actual and active control over the management policies and/or labor relations of the primary employers as to become enmeshed in the janitorial contractors' labor dispute with the SEIU.[49] This, the Respondents failed to do.

Although Respondents introduced hundreds of documents and examined many witnesses during weeks of trial, they were unable to adduce sufficient evidence to meet their burden of proof that the Charging Parties' actions overstepped the expansive borders of neutrality.[50] Rather than showing that WSLP and Lenkin were directly involved in the primary employers' labor disputes in ways which were legally reproachable, the evidence points in the other direction: it indicates that AOBA's strategy was to take steps which would distance the Charging Parties from the labor dispute and remove them from direct involvement in the primaries' labor relations.

In contending that AOBA, on the advice of legal counsel, fomented a deliberate, antiunion campaign and thereby enmeshed themselves and the Charging Parties in the primary employers' labor dispute, the Respondents rely on the following factors: (1) AOBA created a special litigation fund used to oppose SEIU's organizing efforts to which the Charging Parties and the primaries in this matter contributed; (2) AOBA retained Arent, Fox to represent its members in matters relating to the JFJ campaign; (3) AOBA offered special training and counseling on techniques to avoid unionization, and (4) coordinated direct activities by owners/managers and contractors against the Respondents' organizing activities. For the following reasons, I do not find that these factors establish that the the Charging Parties lost their neutrality.

### *E. The Elements of the AOBA Countercampaign*

#### 1. Creation of a special litigation fund and retention of counsel

As detailed in the fact statement, Respondents began an organizing drive in the summer of 1987 among janitorial employees in the District of Columbia. Respondents allege that before commencing any overt activity, they attempted to meet with building owners, property managers, and AOBA representatives to explain their goals and overcome any latent hostility to union representation. In Respondents' view, the Charging Parties, and their cleaning subcontractors among others, overreacted and, without any provocation, immediately began to mount an active campaign of opposition.

The Charging Parties cast the Respondents' party activities in an altogether different light. They assert that the SEIU made it clear from the outset that they were bent on winning voluntary recognition in part by exerting pressure against building owners and managers. They further suggest that AOBA Executive Vice President Slatton became particularly alarmed when Local 525's president, Hessey, threatened that the Union would run over him if he got in their way and, therefore, it would be in his best interests to cooperate. Shortly after this episode, SEIU President Sweeney wrote to numerous owners and managers announcing the Unions' intent to run an "increasingly visible and aggressive campaign (which) will have a direct impact on D.C. building owners and managers." Given such pronouncements, AOBA and its owner-members could harbor no illusions about the Respondents' intent to implicate them in their organizational efforts.

From the Respondent's perspective, the Charging Parties should have remained silent in the face of their organizing campaign or better yet, capitulated. This, the Charging Parties were neither willing nor required to do. While it is true that the SElU had not begun to take concrete actions, it had been issuing storm warnings. The Charging Parties and other members of AOBA took these warnings seriously. They became alarmed by Respondents' early warning signals that they meant to encompass building owners within their campaign. Thus, they insisted that the proposal authorizing AOBA to take a leadership role in a countercampaign developed as a response to SEIU's threats of pressure against them. As the court recognized in *Sears II*, supra at 400, secondary employers, by definition, are bound to be very much concerned about the unionization of the primary's employees because of the economic impact this might have on their cleaning contracts. Consequently, it is not surprising nor does it necessarily evidence a loss of neutrality that the Charging Parties and other AOBA members authorized the trade association to mount a countercampaign.

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> for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[48] Citing *Longshoremen ILGWU (Sunset Line)*, 79 NLRB 1487, 1509 (1948).

[49] Respondents' theory may seem less novel if AOBA is analogized to the parent, company of a corporation, and the Charging Parties and janitorial contractors to its subsidiaries.

[50] Respondents were frustrated in their search for probative evidence. Many of the subpoenaed documents were received in severely redacted form because in camera inspection convinced me that the contents were privileged. Moreover, witnesses associated with both the Charging Parties and the Respondents suffered from faulty memories. This should be neither surprising nor suspect since most were asked to testify in 1991 about specific events, meetings, and conversations held 3 or 4 years earlier.

The proposal which the Charging Parties and others endorsed, contained the following components: AOBA would serve as a clearinghouse for information, educate members on the do's and don'ts of labor law, and serve as the principal contact with the media. Further, the Arent, Fox law firm would be retained as AOBA's advisor and would be financed by a special fund. The fact that the Charging Parties were early supporters of the AOBA plan does not in itself jeopardize their neutrality, for it would be naive to assume that building owners and managers would do nothing at all in the face of the SEIU's unconcealed interest in involving them in their campaign. Thus, it serves no useful purpose to ask whether the Charging Parties were instrumental in initiating the countercampaign. Rather, the relevant inquiry here requires close evaluation of the countercampaign's components and careful consideration of whether by implementing AOBA's strategies, the Charging Parties improperly impeded the Respondents' right to organize the janitorial employees, thereby compromising their asserted neutrality.

The Respondents submit that one of the principal ingredients of the AOBA countercampaign was the establishment of a legal defense fund which financed Arent, Fox's efforts to formulate and implement an owner/contractor strategy to oppose SEIU's organizational drive. Specifically, Respondents contend that the Charging Parties enmeshed themselves in the labor dispute by contributing to and benefitting from this special fund to which the primary employers (among others) also donated. It is undisputed that the Charging Parties and the primary employers were among those who responded to AOBA solicitations, granting substantial sums to the fund in 1987 through 1990. It also is uncontroverted that this fund was used to pay for the services of Arent, Fox legal counsel. The bare fact that the Charging Parties and the cleaning contractors contributed to a common fund and received the same legal advice concerning their responses to the JFJ campaign, means little without examining the contents of that advice. The record is incomplete on this score because witnesses' memories had failed and most documents either were redacted or withheld altogether on grounds of attorney-client privilege. However, available evidence indicates that counsels' advice was well within the bounds of what the law permits. In fact, documents in the record support the inference that counsels' efforts were focused in large part on offering advice to insure, not forfeit, the Charging Parties' neutrality.

Counsels' activities on AOBA's behalf generally fell into the following categories: They (1) attended AOBA meetings and offered advice to AOBA staff and members on how to cope with the JFJ campaign; (2) conducted training sessions; (3) accompanied owners to meetings requested by the SEIU; (4) and represented AOBA and the Charging Parties in various legal actions against the Respondents.[51] Each of these activities is discussed further below.

The record shows that counsel frequently attended AOBA meetings, many of which were held in Arent, Fox's offices, where their role was to provide legal information and advice to members and officers regarding the SEIU's organizational drive. Although the precise nature of this advice was not disclosed on grounds of privilege, some documentary evidence suggests that under counsels' tutelage, AOBA perceived its role to be primarily reactive to events initiated by the Respondents. For example, several notices sent to members announcing forthcoming meetings indicated that they would be informed about how to deal with SEIU pressure tactics. (See, e.g., R. Exhs. 32, 43.) Another notice stated that the purpose of the meeting would be to advise members about meetings "scheduled with Local 525, incidents surrounding various Local 525 demonstrations and recent allegations and demands made by the Union in the course of their Justice for Janitors campaign." (R. Exh. 129.)

An October 5, 1989 notice invited AOBA members to a meeting in the Arent, Fox offices to discuss the "joint employer" issue. (R. Exh. 87.) It stands to reason that counsel's purpose was to instruct the participants about the characteristics and consequences of a joint employer relationship so that they might avoid it. In other words, Arent, Fox presumably warned AOBA members, including the Charging Parties and their respective cleaning contractors, to avoid sharing control over labor policies or employment conditions affecting the janitorial workers.

Nothing in the statute or in precedent suggests that neutrality is abandoned if owners, managers, and cleaning contractors participate in the same meetings at which their lawyer instructs them on legally correct ways to avoid joint employer relationships. As the Charging Parties aptly note in their brief, the Board affirmatively sanctions coordinated activity by a neutral and primary employer when it results in shielding the neutral from picketing at a common worksite. See, e.g*., Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950) (Board approved the maintenance of a reserved gate through which employees uninvolved in the labor dispute could enter without being subject to picketing). By a parity of reasoning, neutral status should not be forfeited when secondary and primary employers come together to obtain advice about the criteria which defines a joint employer relationship, if their purpose is to avoid that relationship in order to insulate the neutral from the effects of the strike. To rule otherwise would put neutrals in the position of being deprived of information regarding legal means to protect themselves from secondary activity. To suggest, as the Respondents appear to do, that a secondary employer may not obtain or act on legal advice, and must do nothing at all if it wishes to retain its neutral status demands an exercise of restraint not required by the cases construing Section 8(b)(4).

Although Respondents attempted to extract concrete information from numerous witnesses about the meetings at which the SEIU was a frequent topic of discussion, no one was able to recollect anything specific. Such failures of memory cannot be the basis for inferences either that the witnesses were purposely concealing harmful information or that counsel used the meetings as a platform to disseminate antiunion advice. As stated earlier in this decision, it is understandable that witnesses were unable to remember specific discussions at meetings which occurred some 2 or 3 years before. Given the witnesses inability to provide detailed accounts of these meetings, the record remains barren of evidence indicating that they provided a fora where the Charging Parties and primary employers, with assistance from counsel, plotted to interfere with Respondents' efforts to organize janitors throughout the city.

The SEIU Legal Defense Fund also may have paid counsel for a November 1987 article in AOBA's newsletter, entitled, "When the Union Knocks." As the title implies, the purpose of the article was to inform AOBA readers about what they should

[51] The word "they" refers primarily to Arent, Fox attorneys, Alan Siegel and Joanne Ochsmann. Although they often both appeared at AOBA-sponsored events, occasionally, one or the other attended alone.

and should not do if they become involved in the SEIU campaign. Initially, the author took a balanced approach, advising the reader about the rights and limitations on employee, employer, and union organizational activity under the Act. However, it is not difficult to discern that the author's basic premise was that AOBA members wanted to avoid union representation of their employees. Thus, in explaining how to respond "When the Union Knocks," and demands recognition based on an asserted card majority, Siegel exhorted the reader to avoid certain steps which could be construed as conferring voluntary recognition. Similar advice was offered in a November 16 memo sent to AOBA cleaning contractor members.[52] Such advice can hardly be characterized as wholly neutral for neither the article nor the memo mentioned that an employer also has the right to grant voluntary recognition should he chose to do so.Respondents argue that if AOBA, its labor counsel and its members, particularly the Charging Parties, were genuinely uninvolved in the SEIU labor dispute, they would not have been concerned if the cleaning contractors granted voluntary recognition nor insisted on Board-conducted elections. The flaw in Respondents' argument stems from their assumption that "wholly unconcerned" means that neutrals must be totally disengaged from a labor dispute if they are to retain their neutrality.[53] As the court made clear in *Sears II*, supra at 401 fn. 19, the phrase "wholly unconcerned" cannot be taken literally. Here, Siegel proposed that employers withhold voluntary recognition and "instead, demand that the Union prove its claim of majority status in an appropriate bargaining unit through a Labor Board election"; advice based on the Supreme Court's decision in *Linden-Lumber Division v. NLRB*, 419 U.S. 301 (1974).[54] In other words, the Siegel article and a subsequent AOBA memo which contained much the same advice, simply encouraged employers to do what the law permitted. Even if the Charging Parties can be held responsible for the Siegel article under an agency theory, it would be anomalous to penalize them for endorsing a legally valid position.

No evidence was presented in this case that either USSI or Red Coats acted on Siegel's advice, but even if there was such proof, it would have no bearing on the Charging Parties' neutrality. Much closer ties must exist between secondary and primary employers than were present here before the Board and the courts will declare a forfeiture of neutral status. See e.g., *Simplex Wire Co*., supra; *Teamsters Local 391 (Vulcan Materials)*, 208 NLRB 540 (1974), enfd. 543 F.2d 1373 (D.C. Cir. 1976), cert. denied 430 U.S. 967 (1977).

[52] Although Slatton's name appears as the author of the memo, it evidently drew on the contents of the Siegel article, and may have been drafted by him.

[53] Whether it is appropriate to conclude that the Charging Parties endorsed the point of view espoused in the Siegel article depends on whether he was acting within the authority conferred as their agent in this matter. Given the Charging Parties' support of the proposal establishing the countercampaign, their approval of Siegel's retention to represent AOBA in the JFJ campaign, their contributions to the SEIU legal defense fund, and their failure to refute the contents of the article, it is fair to conclude that the Charging Parties may be held responsible for the views expressed therein. See *Star Kist Samoa Inc*., 237 NLRB 238, 246 (1978).

[54] In *Linden-Lumber*, supra, the court held that an employer presented with authorization cards purporting to demonstrate the union's claim of majority status, has no obligation to recognize the union.

2. The barring letters

Lastly, as further proof that the owners, AOBA and Arent, Fox were engaged in a conspiracy to oppose the JFJ campaign, Respondents point to barring letters which the Charging Parties issued at AOBA's direction, prohibiting SEIU members and their supporters from entering their buildings. To properly evaluate Respondents' claim, it is necessary to consider the events which preceded the issuance of the barring letters.

As Slatton's unrefuted testimony makes clear, property owners began notifying him that the police were failing to respond promptly to reports of disruptive demonstrations taking place outside and within their buildings. Consequently, Slatton and counsel met with a police official to establish appropriate procedures which owners or managers might invoke in seeking police assistance should such intrusions recur. Based on a police recommendation, AOBA prepared a model barring letter which it urged its members to issue. Thereafter, the Charging Parties, and 26 other companies, sent such letters to Hessey. In addition to Slatton's testimony, documents were introduced into evidence establishing a clear connection between the SEIU demonstrations and the owners' interest in putting an end to intrusions within their buildings. The barring letters themselves say nothing about demonstrations outside the buildings; they proscribe only activity which was set to take place within the premises. Given the circumstances leading up to the issuance of the barring letters, I am persuaded that they were designed to discourage further disruptive conduct, not to impede lawful union activity.

In certain respects, the letters went beyond what was necessary to accomplish the Charging Parties' stated objective of excluding disruptive demonstrators from their premises. They prohibited entry even if only one person associated with the JFJ campaign was involved, whether or not that individual was a janitorial employee working at the building or a union staff member, without regard for the purpose of the entry. For example, under the terms of the barring letter, a SEIU supporter who entered the WSLP lobby to patronize one of the retail shops located there could be charged with criminal trespass. For this reason, the Honorable Henry Kennedy of the Superior Court for the District of Columbia granted partial summary judgment on Respondents' motion to overturn the ban, finding that it constituted unlawful discrimination on the basis of source of income under the D.C. Human Rights Act in that it precluded entry by anyone associated with the JFJ campaign even if for a business purpose unrelated to union activity. The letters also drew no distinctions between demonstrators who were union personnel and those who were employed by the cleaning contractors servicing the respective buildings.

In issuing the barring letters, the Charging Parties participated in a coordinated effort; yet, it does not follow that they were enmeshed thereby in a concerted movement to oppose union organization. In light of Respondents' forays within various buildings in the downtown area, I am persuaded that the Charging Parties' motives were primarily defensive; in other words, they sent the letters to prevent intrusive demonstrations inside their facilities. Supporting this conclusion are the barring letters themselves. In clear terms they prohibit SEIU activists from entering the targeted buildings; they did not purport to proscribe organizing activities which occurred in public places on adjacent sidewalks.

In *Service Employees Local 32B–32J (Dalton Schools)*, 248 NLRB 1067 (1980), the union contended that the secondary

employer had surrendered its neutrality by promising the local that any contract reached with the primary contractor would be applied retroactively if the unlawful picketing ceased. In rejecting the union's contention, the administrative law judge, with Board approval stated: "No precedent is advanced to support the view that a neutral's efforts, however fruitless, to seek relief from a union and get out from under unlawful picketing somehow aligns the neutral with the primary so as to justify picketing the former." Id. at 1069. This statement is equally applicable to the instant case.

3. Conclusion

If this case had been tried in the court of public opinion, there might be some who would conclude that in reality, the Charging Parties possessed ultimate control over the janitors' wages. They also might agree with the Respondents that building owners and managers were not disinterested neutrals as that term is defined in laymen's terms, having no interest in Respondents' labor dispute with the primaries, and that to assume otherwise elevates form over substance. Thus, they would conclude that WSLP and Lenkin were legitimate targets in the JFJ campaign.

Of course, this case was tried in an administrative forum governed by a statute and precedents which strictly circumscribe a labor union's secondary activity. Existing law rests on the premise that no secondary employer is wholly unconcerned in a labor dispute since the primary employer's increased labor costs can be passed on to it. Given this premise, a demanding burden of proof confronts respondent unions which hope to prove a loss of neutrality.

Here, the Respondents were required to establish that the Charging Parties, through AOBA or otherwise, actively exercised significant control over USSI's and Red Coats' labor relations. *Sears II*, 467 F.2d at 399–400. Respondents did not meet this exacting standard. The evidence presented did not establish that WSLP or Lenkin had significant bonds with USSI or Red Coats, respectively, which allowed the Charging Parties to dictate or determine their labor policies. While the primary and secondary employers in this case contributed to the same legal fund, received advice from the same legal counsel, and attended training sessions and meetings together, they engaged in these activities independently and voluntarily in defense of their individual interests. It is quite likely that the Charging Parties and the secondary employers had identical and hostile views toward the SEIU organizational drive, for they each actively participated in AOBA's countercampaign by contributing to a common fund which paid retained counsel for services which included advising them of their legal rights and responsibilities, keeping them informed about Respondents' tactics, and offering representation during meetings with Union officials. Affirmatively, the Charging Parties, among others, issued and then retracted barring notices, which by their terms, were designed to protect their properties from invasive demonstrations. However, under present precedent, none of the foregoing actions are sufficient to establish that WSLP and Lenkin had the sort of relationship with the secondary employers which would warrant their loss of neutral status pursuant to Section 8(b)(4)(B). Thus, it follows that the Respondents have failed to produce sufficient evidence to sustain their contentions that the Charging Parties forfeited their neutral status. Accordingly, the General Counsel's and the Charging Parties' Motions for Partial Summary Judgment are granted.

V. CONCLUDING FINDINGS REGARDING THE JOINT EMPLOYER ALLEGATIONS

In its second affirmative defense, Respondents submit that Lerner, as managing agent for the Washington Square building, was a joint employer of the USSI daytime cleaning crew, and, therefore, secondary allegations relating to SEIU activity at that site should be dismissed.[55] In support of this defense, Respondent relies wholly on the testimony of one day-shift janitor, Francis Adigun. He testified that Cynthia Carr, Washington Square maintenance supervisor, assigned him his duties, checked on his performance, provided him with supplies and frequently asked him to substitute for absent WSLP cleaners at which time he would use WSLP equipment.

I have no doubt that Adigun testified truthfully.[56] However, while I credit his testimony, it does not follow that Carr exercised such significant control over his or any other janitor's terms and conditions of employment as to convert WSLP into a joint employer with USSI. A review of the record reveals that Lerner's involvement in supervising USSI employees was minimal. No one associated with WSLP hired, disciplined, or terminated USSI employees. USSI alone handled such matters and USSI alone made the decision to transfer Adigun to Washington Square from another location. While Carr directed Adigun to his workstation and pointed out the nature of his duties when he first reported to work at the Washington Square building, she did not exercise much discretion in doing so, for it may be inferred that he was filling a vacancy. By Adigun's own testimony, when problems arose, Carr contacted his supervisor, Allen, who would visit the building as often as necessary to resolve them.[57] Similarly, in *Charlotte Union Bus Station*, 135 NLRB 228 (1962), no joint employer relationship was found where, inter alia, bus station personnel reported complaints to contractor's management, not to its employees. Moreover, the fact that Carr checked the areas which Adigun cleaned did not necessarily make her his supervisor. Few building managers who must satisfy their lessees, would do less to insure that a cleaning service with which it had contracted was fulfilling its obligations in a satisfactory manner. See *Teamsters Local 732*, 229 NLRB 392, 403 (1977).

In providing some supplies to the USSI day-shift cleaners, and in asking Adigun to substitute for absent WSLP workers, Carr did exercise some authority which bears the earmarks of a joint employer relationship. However, it appears from Adigun's

[55] Respondents' second affirmative defense is that "WSLP, or its principals, exercise sufficient control over, and are sufficiently involved in, the performance of janitorial duties at 1050 Connecticut Avenue, N.W., Washington, D.C. by employees being paid by USSI to forfeit any claim to neutral status.

Respondents also alleged in their fifth affirmative defense that Lenkin and Red Coats were joint employers. Since Respondents introduced no evidence to prove this contention, the Charging Parties' motion to dismiss this defense is granted.

[56] Any difficulty that Adigun had in answering questions was due to the fact that he was foreign born, and perhaps uneducated. It was apparent, from his entire aspect, that he answered questions to the best of his ability.

[57] The General Counsel and Charging Parties struggled to prove that another USSI janitor at the 1050 location, James Taylor, was a supervisor. Yet, although he was on site, no one in WSLP's management turned to him when problems arose. Although he alone possessed a key to USSI's suboffice in the building, and delivered timecards each week to the central office, these functions reveal little more than that he was a trusted employee.

testimony, that he was the only USSI employee whom Carr occasionally asked to fill in for absentees. More than this is needed to prove that WSLP and USSI were joint employers. Adigun was only one of five USSI janitors who worked on the day shift at the same time that three WSLP maintenance workers also were on the job. In contrast, 50 to 60 USSI janitors worked on the night shift at Washington Square with no other WSLP cleaning employees or supervisors on the scene.[58] Surely, the tail would be wagging the dog if the experience of one employee sufficed to prove the presence of a joint employer relationship here. A loss of neutrality cannot hang on such a slender reed. In fact, the relationship of USSI janitors to WSLP employees and supervisors was not unlike that found at many common worksites. In such circumstance, one independent contractor may exercise some supervision over another contractor's work with out eliminating the independent status of each, or making the employees of one contractor the employees of the other. See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689–90 (1951).

## VI. CONCLUDING FINDINGS AS TO THE 8(B)(4) VIOLATIONS

### *A. Applicable Legal Principles*

Having decided that WSLP and Lenkin are entitled to neutral status, the next question to be resolved is whether the Respondents engaged in prohibited conduct, for a proscribed objective within the meaning of Section 8(b)(4)(B)(i) and (ii).[59] Broadly speaking, 8(b)(4)(i) addresses union appeals which are calculated to induce or encourage employees to withhold their services from their employer, while (ii) turns on whether the union's conduct threatened, coerced, or restrained and normally is thought to apply to the secondary employer.

If read literally, the phrase "any individual employed by any person" in subsection (i) could apply to any employee, including the highest officials of a business. However, the Supreme Court clarified the scope of the provision by ruling that "the applicability of subsection (i) turns upon whether the union's appeal is to cease performing employment services or is an appeal for the exercise of managerial discretion" which would fall within the ambit of subsection (ii). *NLRB v. Servette, Inc*., 377 U.S. 46, 50 fn. 4 (1964).

The Court also considered the meaning of the words "induce or encourage," and determined that they "are broad enough to include in them every form of influence and persuasion." *Electrical Workers IBEW v. NLRB*, 341 U.S. 694, 701–702 (1951). Presumptive evidence of inducement or encouragement will be found where a union pickets at entrances used by neutral employees without complying with the *Moore Dry Dock* standards. See, e.g., *Teamsters Local 139 (Ready Mixed Concrete)*, 200 NLRB 253, 254 (1972*), Los Angeles Building & Construction Trades Council (Silver View)*, 216 NLRB 307, 308 (1975). Cf. *William Burns Detective Agency*, supra at 437 (Board refused to find 8(b)(4)(i) violation where union neutralized impact of picketing at trade show by notifying other unions that their members were free to continue working at exhibit hall and by failing to seek strike sanctions).

Under certain circumstances, words alone (either written or oral) may induce or encourage secondary boycotts. For example, in *NLRB v. Electrical Workers IBEW Local 3*, 477 F.2d 260, 265 (2d Cir. 1973), a union agent told members that in his opinion, working with strike replacement workers would be a violation of trade union principles. Subsequently, a number of those members refused to handle goods distributed by the replacements. The court held that the agent's request for cooperation was an inducement or encouragement. See also *Hoffman Construction Co*., supra, 292 NLRB at 562 (union violated 8(b)(4)(i) by distributing leaflets to neutral employees and telling them their unions supported picketing); *Painters Local 48 (Hamilton Materials)*, 144 NLRB 1523 (1963), enfd. 340 F.2d 107 (9th Cir. 1965), cert. denied 381 U.S. 914 (1965) (statement to secondary supervisor that primary was unfair was unlawful inducement).

With respect to both subsections, the General Counsel must prove that at least one of the union's objectives was to force or require any person, "to cease doing business with any other person." The phrase, "cease doing business" is not literally construed to require a total termination of a business relationship between the secondary and primary employers. It also includes conduct which is intended or likely to disrupt or alter the business dealings between the two. See *NLRB v. Operating Engineers Local 825,* 400 U.S. 297, 304–305 (1971); *C.D.G. Inc.,* supra*; Rollins Communications,* supra*; New Beckley Mining Co.,* supra. This proposition holds true even where a neutral may have no direct relationship with the primary but is being pressured to intercede in the union's dispute. See *Teamsters Local 732 (Servair Maintenance)*, 229 NLRB 392, 400 (1977); *Iron Workers Local 272 (Miller & Solomon Construction)*, 195 NLRB 1063 (1972), enfd. 479 F.2d 920 (D.C. Cir. 1973).

Provisos to Section 8(b)(4) exempt from primary picketing and "publicity, other than picketing," if the publicity is for the purpose of truthfully advising the public, including consumers and members of a labor organization, that the picketed person distributes products obtained from an employer with whom the labor organization has a primary labor dispute.

Determining whether a union's activities had a lawful objective is particularly problematic where, as here, the primary employees work at a secondary employer's premises. In confronting the recurring problems associated with picketing at a common situs, the Supreme Court pointed out in *Denver Building Trades Council v. NLRB,* 340 U.S. 675, 692 (1951), that the Board must take into account the

> dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending

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[58] WSLP security guards were on duty at night and distributed keys to the USSI workers. However, this does not evidence integrated operations as much as it indicates the sort of coordination which is necessary when different groups of employees work at a common situs.

[59] The relevant language in Sec. 8(b)(4)(i) and (ii) provides:

Section 8(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 a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods . . . 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 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.

Some of the activities also are alleged to have violated Sec. 8(b)(1)(A). The text of this provision is quoted in this decision.

employers and others from pressures in controversies not their own.

In light of these sometimes conflicting objectives, the Board has long relied on the following oft-quoted *Moore Dry Dock* guidelines to determine whether the union's intent in engaging in picketing at the secondary situs is primary and lawful or unlawful because it has a proscribed secondary object:[60]

(a) The picketing is strictly limited to times when the situs of 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.

The controlling factor underlying these criteria is the requirement that the picketing "be conducted so as to minimize its impact on neutral employers insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the employees of the primary employer." *Nashville Building & Construction Trades Council (H. E. Collins Contracting)*, 172 NLRB 1138, 1140 (1968), enfd. 415 F.2d 385 (6th Cir. 1970). In short, neither party's rights are absolute and unqualified.

It is the General Counsel's burden to prove that a union has not complied with the *Moore Dry Dock* standards. *Electrical Workers IBEW Local 970 (Interox America),* 306 NLRB 54 (1992). However, if a union's activities meet these guidelines, its conduct is presumed to be primary and lawful. Id. Because the standards are not to be applied in a rigid, mechanistic manner, failure to comply will not be regarded as proof of illegality per se. Rather, the Board and the courts look to the "totality of the circumstances" to ascertain whether the union's purpose was to enmesh the neutral in its labor dispute. Whether the union acted with unlawful intent "is measured as much by the necessary and foreseeable consequences of its conduct as by its stated objective." *Mine Workers (New Beckley Mining)*, 304 NLRB 71 (1991). In considering the "totality of the circumstances, the Board takes into account any evidence which sheds light on the union's objectives, including statements and conduct prior to the unlawful picketing. See *NLRB v. National Assn. of Broadcast Employees (ABC)*, 631 F.2d 944, 950–51 (D.C. Cir. 1980); *Laborers Local 332 (C.D.G. Inc.)*, 305 NLRB 298 (1991); *Electrical Workers 441 IBEW (Rollins Communications)*, 222 NLRB 99 (1976), enfd. 569 F.2d 160 (D.C. Cir. 1977).

### *B. Application of Legal Principles to Facts of this Case*

An analysis of the evidence in this case begins with the recognition that the Respondents were well aware of the distinctions which the law draws between primary and secondary employers. They understood full well that their primary labor dispute was with USSI and Red Coats, among others. At the same time, the record suggests that the SEIU was convinced that the law was out of sync with reality; that power over the janitors' terms and conditions of employment was concentrated in the hands of a relatively small band of property owners, including the Charging Parties. Pursuant to their perspective, the Respondents decided early on to bring pressure to bear on building owners through a variety of tactics.

Of course, not all conduct directed at secondary employers is outlawed by Section 8(b)(4). Distinctions must be drawn "more nice than obvious" between lawful and unlawful secondary acts. *Electrical Workers v. NLRB,* supra at 674. In drawing such distinctions, two questions must be answered: (1) did the Respondents use proscribed means; that is, did their conduct induce or encourage any person to strike or refuse to perform any services, or did it threaten, coerce, or restrain any person; and if so, (2) was the Unions' purpose to force or require any person to cease doing business with a primary employer or require that the primary recognize and bargain with it. In resolving these questions, I find sufficient evidence which shows that the Respondents often aimed their activities directly at the Charging Parties and other neutral persons to coerce them into ceasing to do business with the primaries or require that USSI and Red Coats grant recognition to Local 525.

#### 1. The October 19 visit was not unlawful

As detailed in the fact statement above, six of Respondent's emissaries visited Washington Square's offices with a letter for Building Manager Reed. Ignoring the receptionist's request to wait in the reception area, they trailed her into another employee's office. Although six people are not needed to bear the weight of one letter, and although they went where they were not invited, the delegation was neither disorderly nor impolite. Their visit was brief and they departed as soon as they left the letter for Reed.

None of the delegation members asked anything of the two women in the Washington Square office other than to transmit the unopened letter to their supervisor. Thus, it cannot be said that they urged the two women to withhold their services either by oral or written communication. Further, the letter contained no threat or promise of penalty in the event the building manager failed to acquiesce to Hessey's written request that she help resolve the SEIU's labor dispute with the janitorial contractors; she was free to ignore the letter if she chose. Under these circumstances, I find no evidence that Section 8(b)(4)(i) or (ii) was violated.[61]

#### 2. Respondents were not engaged in picketing prior to October 30

Paragraph 13 of the amended consolidated complaint alleges that Respondents engaged in unlawful picketing from October 25 until on or about November 14 at the Washington Square building. The General Counsel submits that the Respondent's activities from October 25 to 29 were presumptively unlawful because the pickets failed to carry placards identifying USSI as the primary employer with whom it had a labor dispute, as the fourth *Moore Dry Dock* standard requires. The General Counsel and the Charging Parties further assert that because Respondents' signs were deficient prior to October 30, thereafter, they were required to identify the primaries on every sign, a duty they failed to observe and thus, continued to violate the fourth Moore Dry Dock guideline.

SEIU Organizer Brown admitted that none of the signs carried prior to October 30 identified USSI.[62] However, he

[60] *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950).

[61] Even if I were to find the presence of six people in the office coercive, neither of the two Lerner employees had the authority to terminate the Charging Party's business relationship with USSI.

[62] Remick believed some signs read USSI but he had difficulty separating out one day's picketing from another. Therefore, I find Brown's recollection more reliable.

claimed that October 25, 26, and 29 early evening assemblies in the vicinity of the Washington Square building were after-work gatherings or meetings, not picketing, as he understood that term.

The evidence is scant as to exactly what occurred on these dates. Brown indicated that the group discussed issues and shouted slogans. WSLP Security Police Chief Remick stated that some 20 to 25 individuals generally were involved in what he termed picketing. Yet, he also said they were grouped at the intersection of Connecticut Avenue and L Streets. He did not say that the patrolling, parading, or marching took place. In fact, he did not explain precisely what he meant when using the word "picketing." A handbill distributed earlier that day merely advertised the 5 p.m. meeting as prestrike civil disobedience training, but no specific information was presented regarding the substance of other gatherings on October 26 and 29.

The threshold question is whether the prestrike, late-afternoon events, constituted picketing as the General Counsel contends, or meeting/rallies as Respondents allege. If they are the former, and the pickets failed to carry signs identifying USSI, then, under *Moore Dry Dock*, the activity presumptively ran afoul of Section 8(b)(4)(B)(i) and (ii).

No bright line exists which conveniently and invariably distinguishes picketing at a common site from other forms of group activity such as rallies or demonstrations. As the Supreme Court lamented in *Thornhill v. State of Alabama,* 310 U.S. 88 (1940), "the vague contours of the term 'picket' are nowhere delineated" in the statute." However, some guidance may be found in an early case, *Service Employees Local 399 (William Burns Detective Agency)*, 136 NLRB 431 (1962). In that case, the Board found that although union members were not carrying signs or wearing identifying union insignia, and did not speak to passersby, they, nevertheless, were engaged in picketing to protest the employment of nonunion security guards when groups of 20 to 70 persons patrolled in an elliptical path at the only entrance to an arena in which a trade show was being staged. In reaching this conclusion, the Board relied on the fact that the patrolling was in tight formation, which gave the appearance of conventional picketing and impeded access to trade show patrons. Further, the Board found the number of pickets who engaged in the patrolling much greater than required for handbilling or publicity purposes, thereby posing an additional restraint on those who might wish to enter. Id. at 436–437. Similarly, in *Omaha Building Trades Council (Melvin Simon & Associates)*, 284 NLRB 328, 335 (1987),[63] the Board adopted the judge's conclusion that patrolling converted a rally into routine picketing at a common situs. More recently, in *Laborers Local 332 (C.D.G., Inc.)*, supra, 305 NLRB 298, the Board was not persuaded that a parade permit legitimized a union's conduct where 300 to 400 union members completely surrounded a common situs building, blocked all entrances for about one-half hour and then held a rally at which members held signs calling for better employment conditions and distributed handbills. On these facts, the Board found that "the conduct amounted to restraint and coercion" against the neutral building owner and manager to pressure them into persuading a subcontractor to employ Local 332 members. Id.

However, patrolling is not an irrevocable element of picketing as shown by the Board's ruling in *Mine Workers (New Beckley Mining)*, 304 NLRB 71 (1991). In that case, the primary employer, a coal mining company, hired replacement workers during the course of a strike and lodged then in a nearby motel. One day at 4 a.m., between 50 and 140 people, including agents of the union, gathered in the motel's parking lot for a noisy rally during which a union spokesperson, told the motel manager they were offended that replacements had taken their jobs and that he should refuse to house them. Declaring that the "mass activity" constituted picketing in violation of Section 8(b)(4)(ii), despite the absence of picket signs and patrolling, the Board reasoned that

> [T]he activity in question was related to and in furtherance of the labor dispute. . . . the crowd's large size and its participants milling about in the inn's parking lot while shouting, "How you doing scabs" and "why don't you go home," had all the attributes of mass picketing, attributes that . . . were accentuated by the timing of the crowd's arrival at the inn in the predawn.

Id. at 72. In addition, the Board noted that the demonstrators object was not, as they claimed, simply to talk to the strike replacements. Rather, "the pickets sought their removal from the establishment" demanding that the motel manager oust them. Id. at 72. The Board concluded that the crowd's conduct was nothing short of picketing in violation of Section 8(b)(4) since their object was "to exert improper influence on a neutral party". Id. at 72.

The conduct of the JFJ supporters at the early evening gatherings prior to October 30 bears little resemblance to that of the picketers described in any of the cases cited above. Aside from Remick's laymanesque use of the word "picketing," there is no evidence that the 20 to 25 participants in these gatherings were patrolling, marching, or parading. Further, there were far fewer persons present than were involved in any of the cited cases. No one testified that the assembled individuals were confrontational, that handbills were distributed, or that blocking occurred which impeded pedestrians. No evidence was presented that any demonstrator entreated other individuals to withhold their services. In short, while the Respondents may have staged the rallies in part to give the Charging Parties a hint of things to come, they did not engage in conventional picketing on these few occasions prior to October 30. See *Typographical Union No. 16 (Alden Press)*, 151 NLRB 1666, 1669 (1965) (The Board found no picketing in violation of Sec. 8(b)(4)(i) and (ii)(B) although individuals carried placards and patrolled while handbilling where general parading at "shopping centers and public buildings was not designed to dissuade customers or others from patronizing the establishments . . . nor was it intended to halt deliveries or to cause employees to refuse to perform services, and it did not in fact produce such results.")

While I do not find that the Respondents' 5 p.m. gatherings or rallies qualify as picketing, the Unions' conduct later in the evening on October 25 tells a different tale. Approximately 70 JFJ supporters converged on the Washington Square site at 8 p.m. and walked in a circle for 1-1/2 hours while carrying picket signs and noisemakers. Given Brown's unqualified statement that the Unions' placards prior to October 30 did not identify any primary employer, it follows that at least on one occasion prior to the advent of the strike, the Respondents failed to comply with the fourth *Moore Dry Dock* criterion thereby presumptively violating Section 8(b)(4)(B)(i) and (ii).

[63] Enfd. 856 F.2d 47 (8th Cir. 1988).

3. Brown's comments were not threatening

The complaint also accuses Brown of making two separate coercive statements on October 25. Specifically, paragraphs 12 and 14 allege that during the early evening rally, he warned that two owners of WSLP would be sorry for their treatment of janitors, and later that night, attempted to provoke a fight with a security guard.

I find Brown's comment to the effect that Abramson and Lerner would regret their shabby treatment of janitors too ambiguous to warrant an inference that a threat was intended. If, for example, Brown had indicated that the pickets would engage in picketing to be specifically directed again WSLP or its individual owners, such a threat against a secondary clearly would be unlawful. An unadorned comment that the owners would be sorry is simply too vague to support a finding that Brown meant the Respondents would engage in unlawful secondary tactics proscribed by Section 8(b)(4). See *Ozark Interiors v. Local*, 136 LRRM 2251, 2253–2255 (W.D. Mo. 1990); *Plumbers Local 32 v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990).

As for the accusation that Brown attempted to provoke a fight, it is uncontroverted that on the night of October 25, as the picketing was ending, Brown backed into Melvin and then accused him of assault, when all that the guard did was avert a minor collision. Doubt exists as to what else Brown said to the guard because of internal inconsistencies between Melvin's pretrial affidavit and his trial testimony. On direct examination, Melvin asserted that Brown (who was an estimated 60 pounds lighter than the guard) challenged him to a fight, while the chief of security was standing by. But in his affidavit, given closer in time to the incident, Melvin simply stated that Brown dared him to lock him up. Given this inconsistency, and in the absence of any clarification from Chief Remick, I find it improbable that Brown challenged Melvin to a fight and more likely that he challenged him to lock him up.

Brown may have backed into the security guard accidently, but calling a simple touching an assault was not inadvertent. Rather, it was an overstatement so out of proportion to the offense as to suggest an ulterior motive.[64] In accusing Melvin of assaulting him and then daring the guard to lock him up, Brown appArent,ly was attempting to provoke a confrontation in which he could play the victim of Lerner's heavy-handed security force. Brown's conduct was not particularly laudable, but I do not find that it was designed to encourage or induce Melvin to withhold his services. Quite the reverse—Brown was attempting to bait the guard so that he would carry out his duties. Since Brown's remark was delivered to a fairly low-level employee and no evidence was presented that it was communicated to officials with authority to disrupt Washington Square's business relationship with USSI, it cannot be regarded as an appeal to management discretion. Thus, I do not find that Brown's conduct in either instance discussed above offended Section (b)(4)(B)(i) and (ii).[65]

Apart from Respondents' violation of the duty to identify the primary employer with whom it had a labor dispute during night time picketing on October 25, I do not find that the Unions' conduct prior to October 30 was unlawful. Moreover, I do not find that Respondents' failure to comply with the fourth *Moore Dry Dock* guideline on one occasion justifies invoking a presumption that thereafter, every sign carried by Respondents had to identify the primary employers involved in the labor dispute. To hold Respondents to a different standard when the General Counsel stipulated on the record that the picket signs were not in issue after October 30 flies in the face of the Board's repeated admonition that the *Moore Dry Dock* guidelines are not to be applied in a rigid manner.

4. Picketing from November 7 to 14 did not comply with *Moore Dry Dock*

The General Counsel and the Charging Party contend that from November 7 to 14, Respondents also defied the first *Moore Dry Dock* criterion by picketing at Washington Square at times when they had reason to know that USSI employees were not scheduled to work; therefore, they must have had a cease-doing-business objective.

To prove this contention, the General Counsel and the Charging Parties rely on a letter sent by WSLP counsel advising Respondent that USSI employees were no longer working at the building during the hours of 6 to 10 p.m. They also point to WSLP Property Manager Reed's testimony that she informed tenants and security guards that the janitors' starting time would be shifted from 6 to 10 p.m., and then to midnight, based on USSI's notice to her.

Respondents contend that the proof adduced by the General Counsel and the Charging Parties is defective for several reasons. First, Respondents note that both the Charging Parties letter and Reed's testimony were admitted as hearsay and not for the truth of the matter asserted; hence, no competent evidence was introduced to prove that USSI employees were not working when the picketing took place.

Respondents correctly assert that the letter regarding the USSI employees' hours was admitted solely to establish that such notice was sent to them. Thus, neither the Government nor the Charging Parties affirmatively proved that the revised schedules actually were implemented. This issue might have remained in evidential limbo were it not for the testimony of one eyewitness—security guard Kenneth Melvin, who, on cross-examination, recalled that the janitors' schedule was altered sometime after October, so that their shift started at a much later hour. Moreover, the letter of November 7, while not constituting definitive proof that the scheduling change occurred, at least put Respondents on notice that such a change was planned, thereby shifting to them the duty to determine whether the night-shift janitors actually were present during the picketing. Compare *Plumbers Local 5 (H.L. Robertson & Associates)*, 171 NLRB 251, 256 (1968), with *Electrical Workers IBEW Local 302 (ICR Electric)*, 272 NLRB 920, 924 (1984). The Respondents presented no evidence that at that time they attempted to confirm whether or not the workers were on site.[66] Consequently, the Charging Parties' notification letter, together with Reed's and Melvin's testimony and Respondent's failure to present any contradictory proof, gives rise to an inference that a scheduling change was implemented close to the date the

[64] A simple touching may constitute an assault in the law of torts, but Brown was not a lawyer.

[65] It follows that Brown's remark was not, as alleged in the complaint, a threat of violence which restrained or coerced the security guard within the meaning of Sec. 8(b)(1)(A).

[66] At the hearing, Respondents introduced a few timecards which appeared to show that several USSI employees may have been working at the facility in the latter part of the afternoon after November 7. However, Respondents failed to show that they had any information about the presence of employees at the time the picketing actually took place.

Unions received notice. It follows that by continuing to picket from November 7 to 14, after being informed that no USSI employees would be working at the site, Respondent's chose to ignore the first and second *Moore Dry Dock* dictates.

Respondents also argue that even if picketing ensued at times that the janitors were not on the premises, it does not necessarily follow that the first *Moore Dry Dock* standard was breached. Rather, Respondents argue that it was sufficient that USSI maintained an office and equipment at Washington Square, with access available at all times to its managers and supervisors, in anticipation of the employees' return.

The cases Respondents cite to support this proposition are factually distinguishable from the circumstances present here. Consider, for example, *Carpenters Local 345*, 183 NLRB 1109 (1970), where the Board held that the union was engaged in lawful picketing of a primary's office on a Saturday when none of its employees was present, since the evidence showed that the office normally was opened on that day and the union was not advised to the contrary. Similarly, in each of the other cases which Respondents cite, the unions were given no notice that the primaries' employees would be absent from a common situs during the period of time the picketing took place. See, e.g., *Electrical Workers IBEW Local 640 (Timber Building)*, 176 NLRB 150, 151 (1960), *Electrical Workers IBEW Local 861*, 145 NLRB 1163, 1165 (1964). In the latter cases, it was in conjunction with the primary employees' anticipated return to work following intermittent or sporadic absences of short duration, that their employers continued to store equipment at the common site. Cf. *Electrical Workers IBEW Local 595 (Hayward Electric)*, 261 NLRB 707, 709 (1982) (leaving material at common jobsite does not establish primary employer's presence where union was specifically advised that employees would not be working until further notice).

In contrast, the Respondents in this case received formal notice that the primary employees would not be present during the hours that picketing continued. Moreover, the USSI employees were not intermittently or sporadically absent; rather, their scheduling change was fixed and regular. Given these distinctions, I find that Respondents reliance on the above-cited precedents is misplaced.

Finally, Respondents submit that they should be permitted to picket during the normal, prestrike hours whether or not the USSI employees were at work, for to comply with the first *Moore Dry Dock* principle and picket late at night would deprive them of the opportunity to appeal to the public. In making this argument, the Respondents draw a parallel to Board precedent which holds that a union need not be confined to picketing at a reserved gate when it is located at so remote a site as to effectively eliminate the union's ability to bring its labor dispute to the public's attention. By analogy, Respondents argue that the principle which proscribes locating a reserved gate at a remote or inaccessible site also should apply where an employer purposely alters its employees' shift schedules to defeat the union's ability to convey its message to the public. Compare *H. L. Robertson & Associates, Inc*., 171 NLRB 251 (1968) with *Electrical Workers IBEW Local 453 (Southern Sun Electric)*, 237 NLRB 829, 830 (1978), enfd. 620 F.2d 170 (8th Cir. 1980). (Board held reserved gates were improperly established, unjustly impairing effectiveness of Respondent's lawful picketing to convey message to Southern Sun personnel, suppliers, visitors, and general public.) See *also Electrical Workers IBEW Local 50 v. NLRB*, 756 F.2d 888, 891 (D.C. Cir. 1985) (case remanded to Board to reconsider whether union was obliged to confine picketing to a reserved gate effectively hidden from public view).[67] Respondents' point is well taken and I find no way to reconcile it with the two lines of cases referred to above. However, as a judge of first instance, I am bound by Board law which compels continued adherence to *Moore Dry Dock.* Respondent's argument must be taken elsewhere.

It is not difficult to perceive why Respondents continued to picket at Washington Square during the evening rush hour without verifying whether the USSI employees were on the scene. Simply stated, Respondents chose to picket at times which would maximize their ability to reach not only the public, but also Washington Square's owners and tenants, and by so doing, persuade them to intervene in the primary dispute. See *Service Employees Local 254 (United Building Maintenance)*, 173 NLRB 280 (1968); *H. E. Collins Contracting Co.,* supra, 172 NLRB 1140. It follows that by picketing at the Washington Square building between the evening hours of 6 to 10 p.m. after November 7, Respondents failed to comply with the *Moore Dry Dock* guideline that such activity should take place when the primary employer is engaged in its normal business at the situs and thereby violated Section 8(b)(4)(B)(i) and (ii).

5. Picketing and blocking at Washington Square was unlawful

Respondents officially commenced a strike against USSI and Red Coats, among other janitorial contracting firms, on October 30. Throughout the next several weeks, as alleged in the amended consolidated complaint, and as described in the foregoing statement of facts, union agents and JFJ advocates engaged in a range of activities which were designed to enmesh the Charging Parties and other neutrals in a labor dispute which, legally speaking, was not their own.

Respondents began the second day of the strike, October 31, by patrolling at the entrance to the parking garage of the Washington Square building in a manner which impeded access to a number of cars. Although some drivers managed to gain entry, they were the exception rather than the rule. The pickets evidently intended to block the entrance for they timed their patrols to coincide with the approach of each car. Further, when a car chanced to get by, Brown pounded on the roof of the next car. His gestures must be regarded as harassment, if not intimidation, of the facility's patrons. Then, when AFL–CIO Organizing Director Bensinger left his locked car at the garage entrance in a curious, slantwise position, access became totally restricted. Respondents failed to call Bensinger as a witness and produced no other evidence which might suggest that his act was inadvertent. These gaps in the evidence lead me to infer that Bensinger deliberately blocked access to the garage.

Respondents' actions on this occasion are not justified simply because the possibility existed that a few USSI janitors who worked the daytime shift at Washington Square could enter the building through the parking garage. In light of unrefuted testimony that the janitors were never known to use the garage, it strains credulity to believe that location was selected because it

[67] But see *Electrical Workers IBEW Local 970 (Interox America)*, 306 NLRB 54 (1992), Board held that under unusual circumstances involved, union had to confine its picketing to a reserved gate which admittedly limited its access to the public, where the gate was not established in bad faith and the only other available site would enmesh neutrals.

was the situs of Respondents' labor dispute with USSI. Where picketing takes place at a common situs, a union is obliged to picket or conduct other activities in a manner which is least likely to produce secondary effects. *Interox America*, supra. Here, rather than trying to minimize the impact of its picketing on neutral persons, Respondents actions were designed to have the opposite effect. Tenants and other neutrals clearly were Respondents' targets. Accordingly, I find that the purpose and intended impact of the conduct described above was to induce employees such as the garage attendants to withhold their service in violation of Section 8(b)(4)(i). See (*Iron Workers Pacific Northwest Council Hoffman Construction)*, supra, 292 NLRB 562 at fn. 2. In addition, the blocking clearly was intended to have a coercive effect on motorists, parking employees, and indirectly the Charging Party to pressure them into ceasing to do business with USSI. Thus, Section 8(b)(4)(ii) also was violated.

6. The trashing incidents were unlawful

A day later, Respondents' actions became more flagrant. At high noon on November l, while a sizable number of picketers were marching outside Washington Square, demonstrators entered the building and hurled trash bags filled with shredded paper in the Washington Square lobby. The melee got completely out of hand. As Security Chief Remick attempted to waylay the demonstrators, one of them punched him in the face. Another demonstrator struck the property manager with a sack while still another trash bag fell or was hurled over a railing and grazed the head of a customer entering a retail shop on the lower level. While these assaults probably were inadvertent, this does not excuse Respondents which must be held liable for the foreseeable consequences of their acts. *New Beckley Mining Corp.,* supra.

No one was injured during similar picketing and trashing incidents at the Lenkin properties at 1130 and 1133 Connecticut Avenue. There, as at Washington Square, pickets amassed outside the buildings, then entered with and spilled the shredded paper contents throughout the lobbies.

The Respondents submit that their actions at these locations were presumptively primary in nature because the General Counsel failed to prove that Red Coats employees were not on duty at the times in question. However, Lenkin's contract with Red Coats was admitted into evidence and showed that the janitors' normal hours of duty were from 5:30 to 11 p.m. weekdays. In addition, the property managers at the Lenkin buildings confirmed that to their knowledge, these were the Red Coats' hours. With the production of this uncontroverted evidence, the burden shifted to the Respondent to prove otherwise. They attempted to meet this burden by showing that the property managers lacked personal knowledge of the janitors' hours. That showing could lessen the weight attached to their testimony, but falls short of affirmatively proving that Red Coats' employees actually were present at times other than those specified in the contract. Consequently, Respondents failed to prove that they complied with the fourth *Moore Dry Dock* commandment during their picketing-cum-trashing forays at the Lenkin buildings on Connecticut Avenue, supporting the conclusion that they had a secondary objective.

SEIU Organizer Lerner certainly was referring to the trashing incidents when he commented during a subsequent radio broadcast interview that "we find again and again . . . that the tenants are upset by it (the trashing). Many are sympathetic and . . . say to their building owner, we want this settled." (Tr. 1017–1019.) There could be no plainer acknowledgement of a secondary intent than this. In short, Respondents staged these happenings with the certain knowledge that they would inconvenience tenants and others entitled to the peaceable use of the buildings.

7. The assaults were unprovoked

Respondents were careful to schedule the trashing episodes for the noon hour when they surely knew that a substantial number of pedestrians and building occupants would be in the vicinity. They also could have anticipated that security guards would try to prevent such activity. To suggest, as Respondents do, that Chief Remick provoked his own assault during the trashing incident, when he merely was attempting to do his job, is a classic example of transferred blame. Clearly, the injuries which befell Remick, Reed, and a tenant's customer were foreseeable consequences of Respondents invasion of Washington Square.

8. The handcuffing protest was unlawful

A week later, noon-hour picketing accompanied another publicity gimmick: JFJ demonstrators handcuffed themselves across the main entrances to the Washington Square building, making ingress or egress exceedingly difficult. Respondents dispelled any doubt about their objectives on this occasion when the crowd of 80-odd picketers chanted, "shut 'em down." G.C. Exhs. 50 and 51. There can be no doubt that Respondents demonstrated their willingness to pursue secondary objectives, even at the risk of having some supporters arrested.

No doubt, Respondents planned the trashing and handcuffing incidents to focus public attention on the JFJ campaign. However, in staging these dramatic scenes, Respondents clearly had a more limited audience in mind—the employees, tenants, and patrons of the targeted buildings. They were the ones to bear the brunt of Respondents' interference, intimidation, and coercion. The adverse impact on neutrals of Respondents' actions at the three Connecticut Avenue buildings could have been foreseen as the likely consequences of a strategy that went beyond the pale of symbolic protest. As such, the trashing incidents, the assaults, and the handcuffing demonstration violate both Section 8(b)(4)(i) and (ii).

9. Blocking the L Street garage was unlawful

On the day after the trashing, picketing at another Abramson-owned building again bore witness to Respondents' secondary intent. On November 2, a half dozen demonstrators marched slowly across the entrance to a garage which was part of a building owned by Tower Construction at 1707 L Street.[68] Although some cars were able to enter, others drove away. USSI employees cleaned the building but were not responsible for the garage which was operated and maintained by Monument employees. Therefore, by concentrating their picketing at

[68] Respondent contends that there was insufficient evidence to connect the Unions to the activity at the 1707 building since the only witness to the incident, a Monument supervisor, testified that the picket signs read "Justice for jobs, we can't live off of $4.70 an hour." Respondents seem to seek an evidentiary standard strict enough to convict a felon. However, burdens of proof in administrative hearings are less stringent. Here, allowing for the fact that memories fade over time, I find that the language which the supervisor recalled was close enough to the text which admittedly appeared on JFJ placards to conclude that Respondents were responsible for the picketing at 1707 L Street.

the garage entrance, impeding motorists' access to the parking facility, and urging an irate patron to complain to management, the pickets indicated that they were far less concerned with USSI than they were with neutral garage patrons and Monument management, who, if sufficiently provoked, might act as Respondents' surrogates in bringing pressure to bear on the Charging Party. Here, too, Respondents' conduct is proscribed by Section 8(b)(4)(i) and (ii).

*C. The Impact of De Bartolo on Respondents' Activities*

As detailed above, Respondents carried the JFJ campaign to suburban Maryland, specifically to the homes of Albert and Ronald Abramson, to White Flint Shopping Mall, Lenkin headquarters, and the Indian Springs Athletic Club. Since the primary employers had no connection to these properties, the Respondents' actions clearly were directed to the owner, and thus, were secondary in nature.

Respondents vigorously deny that their conduct on these occasions served purposes condemned by Section 8(b)(4). Instead, they maintain that in each instance, JFJ supporters were engaged in peaceful vigils and handbilling. Hence, they argue that these activities were protected by the Supreme Court's ruling in *Florida Coast Building & Construction Trades Council v. De Bartolo*, 485 U.S. 568 (1988).

In *De Bartolo*, a union distributed handbills at the entrances to a shopping mall, urging a consumer boycott of neutral businesses as long as a nonunion contractor was permitted to construct a building there while paying substandard wages. The Supreme Court held that Section 8(b)(4) did not proscribe such peaceful handbilling where there were no other nonspeech elements such as "violence, picketing or patrolling and only an attempt to persuade customers not to shop in the mall." In reaching this conclusion, the Court distinguished peaceful handbilling which merely attempts to persuade, from picketing whose very purpose is to exert influence and produce consequences different from other modes of communication. Id.

Following *De Bartolo*, the Board has approved union handbilling in a variety of situations. See, e.g., *Laborers Local 332 (CDG, Inc.)*, 305 NLRB 298 (1991); *Plumbers Local 32 (Ramada Inc.)*, 302 NLRB 919 (1991); and *Service Employees Local 399 (Delta Air Lines)*, 293 NLRB 602 (1989). These cases, together with several advice memoranda issued by the General Counsel, offer some guidance as to the circumstances under which handbilling may be conducted without offending the Statute.

First, the Board has posited that handbilling is not to be regarded as coercive simply because picketing either precedes or follows it, even where no hiatus occurs between the two. Thus, in CDG some 100 members of a local union engaged in handbilling over 3 days at the entrances to an office building, with the secondary object of pressuring the landlord to cease doing business with C.D.G., a contractor which had a labor agreement with another union. On the fourth day, 300 to 400 persons, many of whom carried signs, participated in the Laborers' march and rally around the building. When the rally ended, 20 members remained to distribute handbills. The Board held that only the march and rally constituted unlawful restraint and coercion under Section 8(b)(4).

Second, the Board's Division of Advice has concluded that picketing and other activities such as rallies and parades do not offend the Act if they are incidental to handbilling, designed to convey a message, and conducted in a nonconfrontational manner. *Carpenters Local 745 (Sheraton Corp.)*, GCM Advice Memo (Jan. 23, 1991); *Service Employees Local 77 (Empire Industrial Maintenance)*, and *Service Employees Local 77 (JMB Property Management)* (May 27, 1988). This conclusion rests on the Board's long held view that it is the element of confrontation between union members and employees, customers, or suppliers trying to enter an employer's premises that converts lawful into proscribed picketing. See *Alden Press*, 151 NLRB 1666 (1965). As discussed below, Respondents' reliance on *De Bartolo* and its progeny to legitimize their conduct is misplaced in all but two of the following incidents.

1. The demonstrations at the Abramson homes were coercive

On the evening of November l, some 50 demonstrators assembled on the street and circular driveway chanting slogans outside the senior Abramson's home while a six-person delegation knocked on his door to deliver a letter. The police responded to Abramson's call and escorted the group off the property so that he was able to leave unimpeded. The demonstrators had other handbills, apparently intended for Abramson's neighbors, which questioned his dealing with a janitorial firm that violated workers' rights.

Two weeks later, on the evening of November 14, approximately the same number of demonstrators paraded and chanted slogans on the street outside Abramson's home while holding candles, with a police escort nearby. A handbill was left at the house which stated, inter alia, that Abramson could hire cleaning contractors who paid better wages.

The foregoing incidents do not warrant protection under *De Bartolo*. Unlike the handbilling which took place in that case, the demonstrations at the Abramson residence involved harassment, the threat of confrontation, and coercion. In *De Bartolo* and subsequent cases, the handbilling and other activities took place on public property in commercial areas, during daylight hours, with a relatively small number of people circulating the leaflets to anonymous passersby. Here, by way of contrast, a large number of people, far more than necessary to deliver a letter, descended on a quiet residential neighborhood at night to target a specific individual. Although only six individuals actually approached Abramson's door on the first visit to his home, the noisy crowd close by made their presence known. That Abramson refused to open the door to the delegation does not dispel the potential for confrontation created by their uninvited visit. It would be naive to believe that the Respondents were oblivious to the embarrassing, even humiliating, impact of their demonstration.

The second demonstration at Abramson's home was not converted into a lawful assembly because the Respondents secured the presence of the police and conducted their vigil on the street with lighted candles. Compare *C.D.G., Inc*., supra, where the Board found that obtaining a parade permit did not conceal the fact that the union actually was engaged in picketing. The threat of confrontation may arise even in the absence of a personal encounter. On this occasion, the fact that none of the demonstrators approached Abramson's door does not neutralize other intimidating aspects of the demonstration. The appearance at night of a large crowd in a residential neighborhood is, in itself, intimidating. Although no picket signs were displayed, the crowd was engaged in activity which had the earmarks of secondary picketing, as demonstrated by their numbers, their choice of location, their parading, and their chanting slogans related to their primary labor dispute. These

circumstances bear some similarity to those described in *New Beckley Mining Corp*., supra, where the Board found that

> [T]he crowd's large size and its participants milling about in the inn's parking lot while shouting, "How you doing scabs" and "why don't you go home," had all the attributes of mass picketing, attributes that in this case were accentuated by the timing of the crowd's arrival at the inn in the predawn.

It is well settled that picketing (or other coercive conduct) violates Section 8(b)(4) if its object is to exert improper influence on a neutral party. Id. Respondents did not venture into the suburbs at night to communicate with the public at large. Their central purpose was to reach Abramson who, Respondents were convinced, had the power to insist that USSI recognize and bargain with them under threat of canceling their contract. Handbilling and demonstrating at night in front of a private residence in a quiet suburban neighborhood is qualitatively different from engaging in those same activities during daylight business hours at the entrance to a shopping mall as in *De Bartolo*, or at a downtown commercial building as in *C.D.G*. Respondents reasonably could foresee that their visit would harass and embarrass Abramson in front of his neighbors and, thus, would have a coercive effect.

Moreover, the handbills which may have been intended for distribution to Abramson's neighbors on November 1, were critical of his contracting with a janitorial firm that paid low wages; the leaflet which came to his attention on November 14 suggested he could hire other contractors who offered a higher payscale.[69] When evaluated in light of Respondents' entire campaign strategy and conduct, the handbills offer telling evidence of secondary intent. In the final analysis, it is the method the Respondents chose to deliver their message to the owner of Washington Square which deprives them of first amendment protections. Respondents were seeking to exert undue pressure on the Charging Party so that it would cease doing business with USSI, an objective forbidden by Section 8(b)(4)(ii)(B). However, it cannot be said that Respondents were attempting to induce or encourage Abramson to withhold his services from the Charging Party and thus, I decline to find that subsection (i) was violated.

Respondents' conduct at Ronald Abramson's home on November 16, did not differ materially from the demonstration at the residence of the senior Abramson. Here, too, 40 to 60 persons congregated at night outside a private home. Only a few demonstrators approached the door to deliver a handbill suggesting that Abramson was a greedy exploiter. From the perspective of Ronald Abramson's 9-year-old son, the situation was frightening. The Respondents are in a poor position to deny any responsibility for the boy's reaction when it was reasonably foreseeable that a child might be in the younger Abramson's home, and, with a child's curiosity, come to the door to see what was going on. As a parent, Abramson had every right to feel even more coerced by conduct which intimidated his child than if he had borne the brunt of the encounter himself. For the reasons set forth above with respect to the demonstrations at the elder Abramson's home, I find that the Respondents' actions at Ronald Abramson's home violated Section 8(b)(4)(ii)(B). Given the presence of the Abramson's housekeeper, a finding that subsection (i) was violated also is appropriate here.

[69] No evidence was introduced to prove that these handbills actually were distributed to Abramson's neighbors or others.

2. *De Bartolo* does not exempt Aspen Hill or Arent, Fox intrusions

Respondents expedition to the Aspen Hill Racquet Club and Fitness Center two nights later was an exercise in rowdy behavior. It will be recalled that after taking part in the noontime handcuffing event at Washington Square, Brown led 40 to 60 demonstrators by bus and van to the Club, which was owned in part by the Lenkins. Six members of the group passed out handbills to patrons, interrupting and interfering with them as they attempted to exercise. At the same time, Brown, with the other demonstrators in tow, remained at the reception desk and facetiously inquired about Club memberships. Brown refused to leave when asked to do so and threatened legal action if staff members did not provide their proper names. Outside the Club, Brown refused to intervene when it appeared a fight might occur between some of the demonstrators and Club personnel.

By no stretch of the imagination can the demonstrators' invasion of the athletic facility be viewed as "peaceful handbilling not involving nonspeech elements." *De Bartolo*, supra, 128 LRRM at 2004. It is highly unlikely that Respondents' real purpose had much to do with distributing handbills, for such a straightforward task could have been accomplished with far fewer people and the leaflets could have been left at the reception desk. A more plausible explanation exists for Respondents' conduct: the demonstrators chose to travel some distance to purposely disrupt the operations of the Lenkin-owned Club in order to coerce Club personnel and patrons and thereby put pressure on Lenkin. Respondents also are liable for inducing the Athletic Club's employees to withhold their service from their employer.

On the morning of November 15, Respondent's president, Sweeney, and several other union officials, met with the Arent, Fox attorneys who represented the Charging Parties. Two hours later, picketing began anew outside the Washington Square building which houses the Arent, Fox firm. During the course of the picketing, SEIU demonstrators entered the firm's offices for what proved to be a far more disruptive and intrusive incident that the one which took place at Aspen Hill.

A law firm may invite the public to its quarters, but this does not grant visitors license to occupy the premises for mischief unrelated to a legitimate business purpose. Here, as many as 20 to 30 SEIU demonstrators left the picket line to swarm noisily through the halls of the law firm, opening doors to offices and meeting rooms without regard to requests that they remain in the reception area and with no respect for notions of privacy or decorum. The Respondents' purpose evidently was to send a message to the Charging Parties' attorneys who they regarded as the masterminds of the anti-JFJ campaign and principals in their labor dispute. Based on all the circumstances in this case, it is fair to infer that the unspoken message the Respondents meant to convey was that attorneys who thwarted the Respondents' goals were not immune from harassment. Such a message is not entitled to Constitutional protection. If Respondents' purpose was to communicate with the Charging Parties' attorneys as claimed, union officials had ample opportunity to do so that very morning when Sweeney met with counsel. In reality, the demonstration had little to do with persuasive speech; rather it was a purposeful attempt to disrupt the lawyers, administrative staff, and clients so as to enmesh the firm in the primary labor dispute. Thus, this escapade also violated Section 8(b)(4)(i) and (ii)(B).

3. Handbilling at 2301 M Street and Lenkin headquarters was not coercive

The facts pertaining to Respondents' handbilling at an Abramson owned building on M Street N.W. and at Lenkin's corporate headquarters in Bethesda, Maryland, are quite different from those relating to the above-described demonstrations, and lead to different legal conclusions.

On November 2, 40 to 50 demonstrators wearing Justice for Janitors uniforms marched to a corner near the entrance of the building at 2301 M Street N.W., a complex partially owned by Lenkin. Brown arrived ahead of the others and left a stack of handbills just inside the door of the apartment vestibule. During the course of the rally, Jay Hessey delivered a brief speech which the crowd punctuated with noisemakers and cries of "Down With Eddie Lenkin." After 20 or 30 minutes the group left. Although the group walked in single file to their rallying point, no evidence was offered that once there, they continued to march, picket, or patrol in any fashion. Nor was there any evidence that they carried picket signs. Moreover, the General Counsel's sole witness to this event admitted that the demonstrators did not block access to the building. They did wear clothing which linked them to the JFJ campaign. However, this identification was no more noticeable than the large yellow hands imprinted with the union's name discussed in *CJA Local 745 (Sheraton Corp.)*, 18 AMR 28023 (NLRB Advice Memorandum, Jan. 23, 1991) or the red T-shirts bearing the JFJ logo referred to in *Service Employees Local 77 (Empire Industrial Maintenance)*, 15 AMR 25114 (NLRB Advice Memorandum, May 27, 1988). In the latter matter, 30 SEIU demonstrators yelled and rang cow bells as they marched in an area close to a building managed by the Charging Party. Yet, the Advice Memo concluded that without proof of confrontation and in the absence of evidence that the demonstrators induced anyone to engage in a work stoppage, their activity was not unlawful. Here, as in that matter, "one of the necessary conditions of picketing, a confrontation in some form between union members and employees, customers or suppliers who are trying to enter the employer's premises" is absent. *Alden Press*, supra at 1669.[70] Indeed, it is unclear that the demonstrators even saw the guard who testified about their demonstration. Consequently, I find that Respondents' conduct on this occasion was protected activity within the meaning of *De Bartolo*.

On November 6, a Lenkin employee personally observed only two individuals distributing handbills during regular working hours in Lenkin's Bethesda, Maryland headquarters. The evidence does not show that the two were noisy or confrontational. Their only misdeed appears to be that they did not leave the building as promptly as they might have at the request of a Lenkin employee.

That same employee later saw seven persons leave the building, but there is no evidence that the other five ventured past the entrance and roamed the building, for no one reported seeing them at any time prior to their departure. There was no picketing, patrolling, parading, or chanting. Apparently, the entire episode lasted 10 to 15 minutes. To be sure, the handbilling did not take place in a completely open public space, as in *De Bartolo*. At the same time, the commercial office building was not a private dwelling nor posted against solicitations. These facts do not justify a finding that Respondents' engaged in coercive or restraining conduct within the meaning of Section 8(b)(4).

*D. An Object of Respondents' Coercive Activity was Proscribed by Section 8(b)(4)(B)*

The General Counsel must prove not only that the Respondents threatened, coerced, or restrained neutral employers, but also that the purpose of such conduct was to "(B) forc[e] or requir[e] any person . . . to cease doing business with any other person."

It is well settled that the "cease doing business" phrase in Section (b)(4)(B) is liberally construed and may be applied to situations other than those in which a secondary employer has severed all business ties with the primary. Thus, in *Burns & Roe*, supra at 304–305, the Supreme Court found that conduct designed to pressure the neutral to change its work assignment policies "was unmistakably and flagrantly secondary." The statute also prohibits secondary conduct intended to disrupt or interfere with the business of a neutral person, even where no direct relationship exists with the primary if the purpose is to pressure the neutral to intercede in the union's dispute. *Longshoremen ILA v. Allied International Inc.,* 456 U.S. 212 (1982*); Teamsters Local 732 (Servair Maintenance)*, 229 NLRB 392 (1977).

In the absence of direct evidence as to a union's objective, the *Moore Dry Dock* standards provide a convenient way to determine whether picketing at a common situs actually is aimed at the secondary employer. As I found above, the Respondents violated the fourth *Moore Dry Dock* precept on one occasion prior to the commencement of the strike—that is, on the evening of October 25, when a large group of demonstrators picketed at the Washington Square building carrying signs that failed to identify USSI as the focus of the labor dispute. Subsequently, after November 7, when the Respondents were notified that the work schedule for the USSI janitors at Washington Square was altered, they continued to picket at that site through November 14, thereby failing to comply with the first and second *Moore Dry Dock* requirements that picketing take place at times when the primary employer is engaged in its normal business at the common situs. Consequently, a presumption arose that the picketing on these dates had an unlawful secondary purpose. Having failed to rebut the presumption, it follows that Respondents' activity on these occasions violated Section 8(b)(4)(ii)(B).

The General Counsel contends in his brief that there was no labor dispute which involved janitorial employees at 1130 Connecticut Avenue or 2301 M Street; therefore, when Respondents engaged in activities at those buildings, they flouted the third *Moore Dry Dock* criterion which requires that picketing take place reasonably close to the situs of the dispute with the cleaning contractors.

The General Counsel appears to assume that a labor dispute is synonymous with a strike. In fact, even where the primary's employees do not strike, a labor dispute may exist and a union may lawfully picket as long as the primary employer is engaged in its normal business at the picketed site. In the instant case, Respondents had struck Red Coats, the contractor at 1130 Connecticut Avenue. Although janitorial employees assigned to that building did not participate in the strike, this did not preclude lawful picketing there.

As for picketing at the building on M Street, the General Counsel did not establish that janitors employed by either of the

[70] I recognize that opinions from the Board's Division of Advice do not constitute controlling precedent. However, I find the analysis sound and, therefore, rely on it as persuasive, if not binding.

primary employers were not on duty at the time. Therefore, no presumption can be drawn that the Respondents violated the third *Moore Dry Dock* precept by picketing at 2301 M Street. In any event, even if Respondent had engaged in conduct condemned by *Moore Dry Dock* at these two locations, it would have no bearing on whether they violated the third criterion at Washington Square.

Thus, a *Moore Dry Dock* presumption of unlawful intent is well founded solely with respect to Respondents' picketing on the evening of October 25 and after November 7 at Washington Square. However, more direct proof of secondary objectives proscribed by Section 8(b)(4) comes from Respondents' own words. From the outset of the JFJ campaign, Respondents written materials repeatedly urged owners and other neutrals to intercede in SEIU's labor dispute with cleaning contractors. Standing alone, such entreaties would not be unlawful. When read in the context of the entire JFJ campaign, they cannot be regarded as isolated statements devoid of secondary implications. Rather, they expose Respondents' overall strategy which, from the beginning, was to target building owners and managers as the true source of power over the janitors' employment conditions.[71] See *Burns & Roe*, supra at 304–305*; Miller & Solomon Construction Corp*., supra, *Electrical Workers IBEW Local 3 (Hylan Electric)*, 204 NLRB 193, 195 (9173); *Rollins Communications,* supra at 101*; Electrical Workers IBEW Local 11 (L.G. Electric)*, 154 NLRB 766 (1965). Thus, when reviewed in conjunction with the frequent occasions when JFJ supporters engaged in patently secondary picketing, a number of Respondents' letters, newsletter articles, and handbills attest to an unlawful secondary intent.

Consider, for example, an article published in a fall 1988 bulletin by the SEIU's Building Service Division which stated:

> Justice for Janitors campaigns have operated according to a uniform strategy which includes: mass organizing to win "voluntary recognition" when possible . . . bargaining master agreements . . . and pressuring building owners, developers and financiers as well as contractors. [Emphasis added.] [G.C. Exh. 59.]

Further, a number of handbills which Respondents distributed during the strike urge tenants to "call your building manager to assist in finding a fair resolution to this matter." (See, e.g., G.C. Exh. 14, 16.) One of the handbills, titled "Update Day 9 Tenant News," implied that the cleaning contractors and building managers were equally responsible for ameliorating the janitors' working conditions. (G.C. Exh. 17.) Handbills apparently intended for neighbors were distributed during the demonstrations at the Abramsons' homes which accused them of contracting with janitorial firms which payed minimum wages and of reaping tremendous profits at the expense of the janitors who cleaned their office buildings. The handbill then stated that "While Abramson is not the janitors' employer, he has the power to hire cleaning companies who will pay decent wages and obey the law." (G.C. Exh. 34.) The next line, printed in bold letters, reads, "Why Does A Lawyer Tolerate Continued Lawbreaking By a Company He Hires?" The leaflet concludes with a suggestion that the reader contact Ronald Abramson and help him "straighten out the family real estate business." Id. By this, the Respondents certainly were implying that neighbors, total neutrals, should pressure Abramson to sever his business relationship with an unjust janitorial contractor. To the same effect are handbills prepared in connection with the demonstration at the senior Abramson's home, and others distributed at the White Flint Mall and the Aspen Hill athletic facility which urged patrons to complain about the choice of contractor. The subtext latent in many of these messages was that the building owners "cease doing business with any other person."

Respondents' unlawful objective also may be inferred from the manner in which they carried out some of their activities. When JFJ pickets patrolled at the entrance to the Washington Square parking garage and when Bensinger parked and locked his car at the head of the garage ramp, Respondents surely foresaw the probable consequences: by impeding access, the garage manager would lose business and motorists attempting to park there, some of whom probably were tenants of the building, would be inconvenienced. The picketing which took place at the garage in the 1701 M Street building was likely to have the same impact on tenant-motorists and parking garage attendants and their supervisors. Similarly, Respondents had to anticipate the inconvenience and disruption of normal activities their trashing and handcuffing shenanigans would inflict on tenants and patrons of Washington Square and the buildings at 1130 and 1133 Connecticut Avenue. Further, the foray to the Aspen Hill Club and the romp through the Arent, Fox offices were purposefully designed to interfere, if not to halt, normal activity of neutrals at both locations. There can be no doubt that Respondents were aware that their antics would irritate and frustrate all but the most saintly tenants and patrons, to the detriment of their everyday pursuits. It is fair to infer that the Respondents engaged in these activities with the hope that some would withhold their services, and/or demand that the Charging Parties remedy the situation. If "the union's intent is measured as much by the necessary and foreseeable consequences of its conduct as by its stated objective," then an inference that the Respondents' objective was unlawful is certainly warranted here. *New Beckley Mining Corp*., supra.

At the same time that Respondents were engaged in actions which adversely affected tenants and potential clients, they also were letting the Charging Parties know that relief from their tactics could be obtained by removing the offending employers or requiring them to come to terms with the SEIU's demands. In either case, the Respondents were signalling by word and deed that the Charging Parties "alone, had the power to resolve the underlying dispute by . . . substantially disrupting their business arrangements with the primary employers." *Rollins Communications*, supra at 101. In short, Respondents waged a campaign of secondary pressure aimed at Washington Square and Lenkin, as well as other neutrals who were incidentally involved, with the objective of enmeshing them in their labor dispute with USSI and Red Coats. Such conduct violates Section 8(b)(4)(i) and (ii) of the Act.

### VII. RESPONDENTS ALSO VIOLATED SECTION 8(B)(1)(A)

The complaint in Cases 5–CB–6712–1 and 5–CB–6712–2 (G.C. Exh. I–V) alleges that Respondents coerced and restrained employees in violation of Section 8(b)(1)(A) by conduct which also was alleged to have violated Section 8(b)(4). Namely, the 8(b)(1)(A) allegations accuse Respondents of restraining or coercing employees by maintaining an unlawful picket line from October 25 to November 14, blocking access

[71] The SEIU conducted extensive research about the real estate holdings of various building owners, apparently in preparation for its JFJ campaign.

to the WSLP parking garage on October 31, assaulting supervisors and a tenant's customer manually and with bags of trash on November 1, and again blocking Washington Square on November 8 when demonstrators handcuffed themselves to the doors of the building.

It is well settled that violence or threats of violence aimed at an employee because of his or her protected activity constitutes coercion and restraint within the meaning of Section 8(b)(1)(A). A union may be held liable for acts of violence by picketers where union officials participate in the misconduct or know of it and fail to disavow it or prevent its recurrence. See *Machinists Local 758 (Menasco Inc.)*, 267 NLRB 1147 (1983). Moreover, nonviolent conduct, including efforts to prevent employees from reporting to work by impeding access to an employer's facility also is proscribed by this section. See *North American Meat Packers (Hormel & Co.)*, 287 NLRB 720, 721 (1987). Even where blocking is not altogether successful, the act of amassing a hostile crowd at a building's entrance in a confrontational manner is, in itself, coercive. Id. Further, although Section 8(b)(1)(A) literally addresses the statutory rights of employees vis-a-vis unions, the provision also may apply to nonemployees, such as supervisors, if employees are present or the incident is likely to come to their attention and would reasonably tend to restrain them in the exercise of their Section 7 rights. Id. at fn. 5.

I found above that Respondents' gatherings prior to the onset of their strike on October 30 did not constitute picketing. Even assuming that the contrary was true; that is, that Respondents were engaged in unlawful picketing by failing to observe the *Moore Dry Dock* criteria, for the entire period alleged in the complaint, I find nothing about such activity which could restrain or coerce employees in the exercise of their Section 7 rights.

I also found as a fact that on October 31, SEIU pickets paraded in pairs across the entrance to the Washington Square garage, purposely keeping many, but not all, cars at bay. Then, Bensinger parked and locked his vehicle slantwise across the entrance, totally preventing access to the facility to all but one intrepid Secret Service employee. These events were witnessed by the garage attendants, and potential customers of the garage, some of whom surely worked for employers located in Washington Square. On November 8, SEIU demonstrators handcuffed themselves to the front doors of Washington Square, again impeding ingress and egress during the busy noon hour. Respondents also scattered trashbags throughout the lobby. They may have engaged in this initiative as a symbolic protest, but that does not mitigate the effects of their deed. Whether they flung the sacks about purposely or inadvertently, Respondents cannot evade responsibility for the foreseeable consequences of their actions, including the harm done to a customer who was struck by a falling sack as she entered a salon on the lower level. Having acknowledged responsibility for the demonstration, the Respondents may not deny liability for its consequences, particularly when there is no credible evidence that anyone but SEIU supporters flung the sacks about, causing them to come apart. Lastly, Respondents' agents were directly at fault for the assaults on Security Chief Remick and Property Manager Reed. Even if no employee witnessed these encounters, news of these uncommon occurrences was bound to reach security guards and others employees who worked in the building.[72] While Respondents probably did not want the demonstrators to strike anyone, neither did any SEIU official publicly condemn such misconduct. In fact, once Brown and others had completed their protest in the Washington Square lobby, they moved on to other nearby buildings to carry out similar maneuvers, suggesting that Respondents had little interest in preventing a recurrence of the protesters' belligerent conduct. In light of the precedents cited above, little discussion is needed to conclude that Respondents' actions on the occasions described above restrained and coerced employees in contravention of Section 8(b)(1)(A).

## THE REMEDY

Having found no merit to the allegations in Case 5–CB–6558 involving General Maintenance Service Company, I shall recommend that the complaint be dismissed. Having further found, however, that the Respondents violated Section 8(b)(1)(A), (4)(i), and (ii)(B) in the cases involving WSLP and the Lenkin Company, I shall recommend that they cease and desist from such practices and take affirmative actions designed to effectuate the Act.

Arguing that Respondents' unlawful acts were extensive and egregious, the General Counsel and the Charging Parties seek a broad cease-and-desist order which would prohibit Respondents from violating the Act in any manner as to all persons in the Washington, D.C. metropolitan area. Respondents assert that because they have not previously been found to have violated the Act, if any order issues, it should be a narrow one tailored specifically to only those unfair labor practices which are found to have merit.

In *Hickmott Foods*, 242 NLRB 1357 (1979), the Board announced that a broad order is warranted on two grounds: "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for fundamental statutory rights." Typically, a proclivity to violate the Act is found where the respondent has a history of prior violations based on similar unlawful conduct. See, e.g*., Iron Workers Local 433 (United Steel)*, 293 NLRB 621, 623 (1989).

However, recidivism is not the sole ingredient. which justifies a broad order. A proclivity to violate the Act may also be based on a respondent's conduct in the particular case before the Board if it "exhibits a blatant disregard of the Act and a clear willingness, if not eagerness to violate it. . . . (as well as) a high probability of recidivism directed against other . . . contractors" *Service Employees Local 77 (Thrust IV)*, 264 NLRB 628–629 (1982), enfd. 123 LRRM 3212 (9th Cir. 1986) (union intentionally ignored reserve gate and picketed at times when it knew no primary employees would be present because of its admitted interest in organizing entire jobsite). A broad order also may be appropriate where respondent's highest officials are involved in the unlawful conduct. *Impact Industries*, 285 NLRB 5 (1987), enf. denied on other grounds 847 F.2d 379 (7th Cir. 1988).

In the final analysis, determining whether a broad order is warranted, and how broad it should be, "turns on the nature and extent of violations committed by the respondent." *Iron Work-*

[72] Apart from the beauty salon manager who observed a trashbag striking her client, there is no evidence, either direct or implied, that this incident became known to other employees. Accordingly, I am unable to find that this aspect of the allegation contained in par. 12 of the complaint constitutes an 8(b)(1)(A) unfair labor practice.

*ers Local 378 (N. E. Carlson Construction)*, 302 NLRB 200 (1991). Thus, in deciding whether to recommend a broad or narrow remedial order here, careful consideration must be given to the nature and number of Respondents' violations and an assessment made as to whether they are likely to engage in similar misconduct in the future against these or other employers in the metropolitan area.

The evidence reviewed above establishes that Respondents' unlawful activities were widespread and in certain instances, flagrant. They picketed for approximately a week at hours when they had reason to know that the primary employees were not at work; they trashed the lobbies of three buildings in 1 day, assaulting a few people in the process. At other times, Respondents prevented access to Washington Square when demonstrators handcuffed themselves to the portals, and blocked ingress and egress to parking facilities at both at Washington Square and 1707 L Street, inconveniencing potential patrons and halting business at both locations. Respondents argument that their actions were justified because janitors had access to these building through the parking garages was specious; they knew or should have known that the janitors did not enter or leave the building that way. Thus, through various strategies, the Respondents attempted to adversely affect as many neutrals as possible as a means of bringing pressure to bear on the Charging Parties.

A number of officials in Respondents hierarchy were responsible for designing and executing many of the JFJ campaign activities. Take, for example, the trashing incidents during which three persons were assaulted. Under International Organizer Stephen Brown's direction, demonstrators invaded suburban athletic club owned in part by Lenkin, while Research Director David Chu led a disruptive parade of demonstrators through the law offices of the Charging Parties' counsel. Further demonstrations were carried to the doorsteps of Albert and Ronald Abramson's Maryland residences.

This record suggests that unless restrained by a remedial order which reaches beyond the immediate employers named in the complaint and encompasses the greater Washington, D.C. metropolitan area, Respondents are willing to adopt tactics which affect any number of neutrals and carry their campaign to any location, private or commercial, in which the Charging Parties have a financial or management interest. Cf. *Metropolitan District Council of Philadelphia (E. Reeves, Inc.)*, 281 NLRB 493, 499 (1986) (order extends to any present and future jobsites where employees of Charging Parties are working).

At the same time, in fashioning an appropriate order, it is important to bear in mind that Respondents began their organizing drive in the fall of 1987; yet, no other remedial orders have issued against them throughout the 3-year period prior to this case. Moreover, the 8(b)(i)(A) and 8(b)(4)(i) and (ii)(B) violations litigated here occurred within a 3-week period in the fall of 1990. In other words, Respondents' unfair labor practices took place during a small fraction of the time that they actively conducted the JFJ campaign. Additionally, findings that Respondents violated several different sections of the Act rest on the same conduct.

It also is relevant that Respondents planned and executed a number of demonstrations in reliance on their construction of *De Bartolo* and its progeny. Although a few cases have shed light on *De Bartolo*, the Board has not yet had the opportunity to delineate all the contours of that decision. Similarly, Respondents vigorously and in good faith argued that the Charging Parties had forfeited their neutral status. If Respondents' argument had prevailed, they would have had a complete defense to virtually all the 8(b)(4) allegations. Since Respondents' theory of shared culpability among the Charging Parties and the primary employers had not been tested at the time they engaged in the conduct at issue here, they did not have the benefit of a definitive Board ruling to guide their actions. Without such certainty, and in the absence of a recidivist history, it would be unjust to conclude that Respondents exhibited "a blatant disregard of the Act and a clear willingness, if not eagerness to violate it." (*Thrust IV*, supra at 528.) In light of these considerations, the remedy in this case will be limited to "like or related conduct."

The Charging Parties, but not the General Counsel, urge that Respondents should be compelled to read the order at mandatory meetings of their staffs, publish it in local newspapers, and announce it on the radio. I have found that Respondents' upper echelon officers were personally involved in engineering and executing the JFJ campaign in Washington and its environs. Those who participated in the picketing and demonstrations simply followed their leaders' cue.[73] Given the SEIU officials' involvement in the campaign, it is inevitable that they and their staffs will quickly learn of the instant decision. Therefore, it is not necessary that the Decision and Order be read aloud at meetings, as the Charging Parties propose. Moreover, newspaper and radio accounts would not guarantee that the contents of the Order reached the right ears. Rather, such a requirement only would serve to penalize the Respondents. Board orders are not issued for vindictive purposes. Rather, as the Board observed in *Long Construction Co*., 145 NLRB 554, 556 (1963), "The cease and desist order, in conjunction with the utilization of the contempt procedures provided in the Act, is well designed to prevent the recurrence of the unfair labor practices and to vindicate public rights."

## CONCLUSIONS OF LAW

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. General Maintenance Service Co., Inc., Washington Square Limited Partnership, and the Lenkin Company Management, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondents violated Section 8(b)(4)(i) and (ii) by:

(a) Picketing at the Washington Square Building on the night of October 25, 1990, while carrying placards that failed to identify USSI as the employer with whom they had a labor dispute.

(b) Picketing at Washington Square from November 7 to 14, 1990, at times when they knew or should have known that the primary employees were not working.

(c) Patrolling and parking a locked car in the entrance of the Washington Square garage in a manner which blocked access to that facility.

(d) Demonstrating in the lobbies of Washington Square and at 1130 and 1133 Connecticut Avenue N.W. with trashbags full of shredded paper which opened and littered the lobbies.

(e) Injuring three persons during the course of the activity referred to in subparagraph d, above.

[73] This is not to imply that the assaults which occurred during the trashing episode at Washington Square were orchestrated in advance. To the contrary, it is far more likely that they were unintended and unfortunate consequences of reckless, but unplanned behavior.

(f) Impeding access to a parking facility at 1707 L Street N.W. on November 2.

(g) Picketing and/or demonstrating at Ronald Abramson's home on November 16.

(h) Demonstrating at the Aspen Hill Athletic Club and the Arent, Fox law firm.

4. Respondents violated Section 8(b)(4)(ii) by picketing and demonstrating at Albert Abramson's home on November 1 and 14.

5. Respondents restrained and threatened employees in violation of Section 8(b)(1)(A) of the Act by

(a) Blocking access to the Washington Square garage through patrolling and leaving a locked car at the entrance of that facility.

(b) Assaulting supervisors and a tenant's customer during an unlawful demonstration in the Washington Square lobby.

(c) Impeding access to Washington Square when SEIU pickets handcuffed themselves to the building's doors.

6. The unfair labor practices described in paragraphs 3 to 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The complaint in Cases 5–CB–6558 and 5–CB–6584 should be dismissed.

8. Except as set forth above, the Respondents have not violated the Act in any other respect alleged in the amended consolidated complaints.

[Recommended Order omitted from publication.]