

III. PRELIMINARY STATEMENT

~~{The judgment of the District Court awarding millions of dollars in damages}~~
[On April 24, 1998, after a sixteen-day trial, largely by ambush, the Honorable John Doe issued an order and judgment] against Appellant International Union ~~{should be reversed. The District Court’s conclusion that all of International Union’s strike activity against Appellees BigCo}~~ **[and in favor of Appellees BigCo]** Co. (“BigCo”) and Industrial, Inc. (“Industrial”) ~~{was}~~**[. The District Court’s judgment was a windfall entirely inconsistent with federal labor policy guaranteeing, *inter alia*, the right of employees to strike.**

First, the District Court’s conclusion that International Union’s strikes against BigCo were entirely] illegal under section 8(b)(4)(i)(A) is not supported by the evidence or the law. ~~{It is undisputed that the}~~ **[The]** overriding objective of **[each of]** International Union’s **[three (3) separate]** strikes against BigCo ~~{and}~~ **[or]** Industrial was to require ~~{BigCo and/or Industrial}~~ **[each of them]** to reach **[three (3)]** new~~{,}~~ successor labor agreements with International Union. ~~{This is concededly a lawful objective. In entering judgment against International Union, the}~~ **[Doubless that is a lawful, protected objective of any primary strike. The]** District Court failed to ~~{make the determination required by Section 303 and}~~ **[consider the consequences of this undisputed fact in reaching its conclusions**

and thereby misapplied Section 303, as interpreted by] this Court’s precedents[. **Not only was the District Court remiss in failing to make the determination] that forcing Industrial to rejoin the Association (“Association”) was a [“]substantial cause ~~{of the strike, and}~~ [” of any, much less all three, of the strikes,] the record would not ~~{support}~~ **[have supported] such a determination [had it been made]. [****

]The District Court also **[erroneously]** found ~~{that}~~ International Union's alleged violation of Section 8(b)(4)(i)(A) was an independent basis for awarding BigCo and Industrial ~~{all the securities}~~ **[\$1,417,854.00 in security] costs and [\$1,168,246.61in] lost profits ~~{they requested, but did so}~~ without **[first]** making the requisite causation determination **[and without attempting to distinguish what security costs and lost profits were attributable to lawful conduct.****

Similarly, the District Court also erred by awarding the same lost ~~{-}~~profits and security ~~{-costs damages based on alleged secondary boycott activity in violation of}~~ **[costs based on]**Section 8(b)(4)(i) and (ii)(B). The evidentiary record is devoid of the patterns of identifiable, illegal conduct constituting coercion or threats necessary to sustain ~~{the judgment, and}~~ **[such a judgment, especially with respect to security costs. Second, none of]** the specific lost-profits ~~{damages}~~ awards ~~{did not}~~ meet the substantial factor test ~~{articulated by this Court. The District Court also found that all BigCo’s claimed security costs were recoverable due to International~~

~~Union's alleged secondary boycott activity. The record, however, establishes that almost all the~~ **[required by this Court.**

Third, the record establishes almost all]security costs were incurred in protecting BigCo's primary plants, and [none were incurred in connection with any of the ten (10) alleged incidents of unlawful activity. BigCo's "strike plan," by which it decided to incur the security costs] {such costs are not recoverable based on secondary activity. BigCo does not refute the fact that its "strike plan," including retention of a security force}, was put in place well in advance of any {allegedly unlawful activity. In essence, the District Court} [of the alleged unlawful activity in anticipation of International Union's lawful primary strike. Even if the record shows BigCo vaguely speculated about some secondary activity at the time the strike plan was initiated, there is no evidence of any actual threats or occurrences of secondary activity until long after the plan was approved.

In sum, the] judgment forces International Union to pay {the} [\$2,585,300.61 for] costs BigCo voluntarily {incurred} [chose to incur] when it chose to take a [primary] strike. This result is inconsistent with the objectives of federal labor laws, {including} protecting the rights of unions to bargain legitimately and effectively[, including the right to strike,] without fear of crushing liability {being imposed by

~~a court. The judgment is not supported by the record or by the law and should be reversed}~~ **[erroneously being imposed].**

POINT ONE - THE DISTRICT COURT ERRED IN DECLARING THAT INTERNATIONAL UNION'S STRIKES AGAINST BIGCO AND INDUSTRIAL WERE ILLEGAL BECAUSE THE RECORD DOES NOT ESTABLISH THAT A SUBSTANTIAL OBJECT OF THE STRIKES WAS TO FORCE INDUSTRIAL TO REJOIN THE ASSOCIATION AND THE DISTRICT COURT DID NOT MAKE THE REQUISITE SUBSTANTIAL-PURPOSE DETERMINATION.

The District Court's conclusion that ~~all~~ **[each]** of International Union's **[three (3) separate]** strikes against BigCo ~~and Industrial were~~ **[was]** illegal, based on Industrial's **[(not BigCo's)]** claim under section 8(b)(4)(i)(A), is not supported by the evidence or the law. The ~~judgment should be reversed because the~~ District Court failed to make the required determination ~~regarding whether~~ **[that]** forcing Industrial to rejoin the Association was a **["substantial cause"]** of the strike~~, and~~ **[. Moreover,]** the record does not establish ~~that this motivation was a~~ **[such a motive existed at all, much less that it was a "substantial cause"]** of the strike. The District Court also ~~stated that its determination of liability under~~ **[erroneously concluded]** Section 8(b)(4)(i)(A) was an independent basis for awarding BigCo all of its requested ~~securities~~ **[security]** costs and lost profits ~~((which were claimed based on alleged secondary boycott activity), but the District Court)~~ **[but]** failed to employ the proper causation analysis ~~and therefore improperly awarded damages for security costs and lost profits~~.

A. The District Court Did Not ~~{Make}~~ [Reach] the Necessary Conclusion of Law Regarding ~~{Whether}~~ the Allegedly Illegal Motivation ~~{was a Substantial Purpose of the Strike.}~~ [for the Strike.]

~~{It is undisputed that the}~~ [Although the claim under Section 8(b)(4)(i)(A) was only made by Industrial because it related only to Industrial’s withdrawal of bargaining authority from the Association for its asphalt laydown crews, at trial, the District Court allowed BigCo to pursue the claim and essentially treated all the strikes by three separate bargaining units as one in reaching a decision. This led to a determination that the laydown crew bargaining unit, and therefore all of International Union, were motivated to strike, in part, by a desire to have Industrial rejoin the Association. The] District Court did not make ~~{the determination,}~~], and could not determine, as] required by this Court, that ~~{there is only a violation of Section 8(b)(4)(i)(A) if a “substantial purpose” of the union is to force an employer into a multi-employer bargaining unit}~~ [International Union was substantially motivated to strike in order to force Industrial into rejoining a multi-employer organization, the Association]. *Frito-Lay, Inc. v. Local Union 137*, 623 F.2d 1354, 1360 (9th Cir.), *cert. denied*, 449 U.S. 1013 (1980). [

]BigCo’s efforts to rebuff this challenge to the District Court’s legal conclusions are ineffective. First, BigCo’s citation to *Phoenix Eng’g & Supply, Inc. v. Universal Elec. Co.*, 104 F.3d 1137 (9th Cir. 1997) is inapposite, as that case

specifically deals with challenging findings of fact, not conclusions of law, which are of course subject to de novo review. Second, the ~~{District Court}~~ **[court below]** only stated ~~{that}~~ the strike “was intended, in part, to cause BigCo to rejoin the Association.” (R.E. 484.) This specific statement was followed ~~{only}~~ by a general citation to *Frito-Lay*, with no citation to any particular passage of that decision. It cannot be inferred ~~{that}~~ the District Court actually reached any conclusion other than that the strike was ~~{only}~~ intended **[simply]** “in part” to bring about Industrial’s re-entry into the Association, and that conclusion is insufficient to sustain the judgment

Unlike *Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390 (11th Cir. 1997), cited by BigCo, ~~{here the opinion}~~ **[the decision here]**, “when viewed in its entirety,” does not make ~~{it}~~ clear ~~{that}~~ the District Court reached the required legal conclusion. ~~{Instead}~~ **[Indeed]**, the opinion actually supports **[nothing more than]** the exact language ~~{used by the District Court}~~ **[, i.e.,]** that International Union's actions were motivated ~~{, at most,}~~ **[only]** “in part” by the goal of having Industrial rejoin the Association. *Burrell*, 125 F.3d at 1395. ~~{The District Court did not make the necessary determination that a substantial purpose of the strike was to force Industrial back into the Association, and the judgment~~

~~based on the determination that all International Union's strike activity was illegal must be reversed.}~~

B. The Record Does not Support Affirming the Judgment Because Forcing Industrial Back Into the Association Was not ~~{a}~~ [the Motive for International Union's Strikes and, Most Certainly Was Not the “[Substantial Purpose]” of the Strikes.

Contrary to BigCo's assertion ~~{that evidence “supports the Finding that a substantial purpose” of the strike was to force Industrial to rejoin Association, (BigCo Brief at 12)}~~, the District Court failed to articulate ~~{any such conclusion}~~ **[a “substantial purpose” motive]** and the record ~~{would}~~ **[does]** not support such a determination. BigCo is only able to advance three items in the record that it claims support a determination that forcing Industrial to rejoin Association was a **[“]substantial purpose[”]** of the strike – (1) International Union struck Industrial, (2) at one point during ~~{negotiations}~~ **[one of the three (3) independent sets of negotiations going on at this time, International Union's Business Manager,]** William Waggoner “just expressed his displeasure with” Industrial's withdrawal from Association, (R.E. 101-02), and (3) the **[laydown-crew]** strike ended at the same time as ~~{Industrial}~~ **[BigCo]**¹ rejoined the Association. (BigCo Brief at 13-14.)

¹ Although this claim was brought only by Industrial, a separate legal entity at the time this suit was filed, when bargaining authority was returned to the Association in late December 1995, Industrial had been dissolved, (R.E. 389),

None of these establishes that forcing Industrial to rejoin the Association was a substantial purpose of all of International Union's strike activities.

1. The Fact That the Strike Occurred Does Not Establish That it Was Motivated by an Improper Purpose.

First, the fact that ~~the~~ [a] strike occurred does not itself establish any improper motivation. ~~Even~~ BigCo and Industrial are forced to admit ~~that~~ the strike itself did not occur as a result of Industrial withdrawing its bargaining authority from the Association. It is undisputed that International Union also had disputes with other [current and former] members of the Association, (R.E. 138), and that the strike against Industrial resulted ~~when~~ [only after individual] negotiations between International Union and Industrial broke down. (BigCo Brief at 13.) ~~The fact that International Union struck Industrial cannot be used as evidence that the strike itself was improperly motivated.~~ In *Frito-Lay*, this Court ~~advised that a court should hesitate to infer~~ [admonished the trier of fact against inferring] any illegal motivation based on nothing more than ~~potential~~ [speculation as to the] effect of ~~particular~~ [otherwise lawful] conduct. *Frito-Lay*, 623 F.2d at 1361. ~~This advice~~ [The admonishment] should be followed ~~in this case~~ [here], and BigCo should

and “Industria” had become a trade name of BigCo. (R.E. 96).

not be allowed to rely on the fact that the strike occurred to support a conclusion that it was improperly motivated.

In response to the many ~~{other}~~ **[otherwise lawful]** reasons for striking articulated by International Union ~~{in its Opening Brief, BigCo makes the contradictory argument that while, for purposes of determining liability,}~~ **[BigCo argues]** all of International Union's labor actions against BigCo and Industrial must be viewed as a whole~~{, but}~~. **(BigCo Brief at 5 n.5) But** in determining motivation, **[BigCo claims]** the court should be restricted to the specific ~~{motivations of the International Union bargaining unit for the Industrial laydown crews. (BigCo Brief at 15.) This internally inconsistent argument also ignores this Court's direction that in determining the legality of a strike, the entire strike and related negotiations must be examined as a whole. Frito Lay, 623 F.2d at 1363}~~ **[motivation of International Union with respect to Industrial's membership in the Association. In fact, the argument is locally inconsistent. If, assuming arguendo a substantial purpose of International Union's strike against Industrial was to force Industrial to rejoin the Association, only those damages substantially caused by that strike, and that strike alone, are recoverable].** The District Court ~~{failed to follow the dictates of this Court in Frito-Lay, and improperly concluded that all International Union's strikes were illegally motivated by International Union's desire to have~~

~~Industrial Rejoin Association for the purpose of laydown crew bargaining, a conclusion not supported by the record}~~ **[is required, in so-called mixed motive cases to undertake such a causation analysis and attempt, where possible, to separate out damages resulting from lawful and unlawful activity. The District Court did not do so here, and the record is entirely devoid of evidence supporting such a conclusion].**

2. Testimony Does not Support a Conclusion That a Substantial Motivation of the Strike Was Having Industrial Rejoin the Association.

None of the “evidence” advanced by BigCo in its brief is sufficient to sustain or affirm the District Court’s determination that the strike was illegal. In over 2000 pages of trial testimony, BigCo is only able to point to ~~{the uncorroborated testimony of Dickerson regarding Waggoner’s}~~ **[a single, vague, uncorroborated statement attributed to International Union’s William C. Waggoner. In fact, the statement was nothing more than an]** alleged single expression of displeasure.[

]While BigCo claims the facts in this case ~~{are similar to those in Frito-Lay, where this Court concluded that a union’s illegal purpose was a substantial cause of a strike, a comparison of the two cases actually reveals}~~ **[to be are similar to Frito-Lay, a fair comparison actually distinguishes]** the paucity of evidence ~~{supporting the judgment against International Union}~~ **[here]**. In *Frito-Lay*, this

Court noted that “at several points during the negotiations,” the union suggested that employers get together to negotiate and “went so far as to arrange joint bargaining meetings to be attended by all three employers simultaneously.” *Frito-Lay*, 623 F.2d at 1360-61. Indeed, the Court cited **[actual]** testimony ~~{from}~~ **[of]** union representatives that part of the union’s strategy and tactics were designed to persuade the employers to re-form their multi-employer association. *Frito-Lay*, 623 F.2d at 1361 n.9. ~~{In contrast, BigCo can point to only one statement during the entire negotiation process}~~ **[Here, BigCo points to a single alleged statement]** expressing “displeasure ~~{” with the decision to withdraw.}~~.”]There is no evidence ~~{that}~~ International Union ~~{negotiators}~~ ever even suggested Industrial should rejoin the Association or **[International Union]** engaged in any tactics or strategies ~~{that support}~~ **[supporting]** the conclusion that forcing Industrial to rejoin the Association was a **[purpose at all, let alone a]** substantial purpose of the strike. BigCo’s **[glib]** assertion that unions always prefer to bargain with multi-employer associations is contradicted by the only evidence in the record on the issue, Waggoner’s testimony specifically denying that ~~{assertion}~~ **[contention]**. (R.E. 208-09.)

3. BigCo Cannot Rely on ~~{Industrial's}~~ [Its] Ultimate Decision to Rejoin the Association.

Finally, contrary to BigCo's assertion, the District Court's reliance on ~~{Industrial}~~ [BigCo's] rejoining the Association is insufficient [as a matter of law] to establish that forcing Industrial to rejoin was a substantial purpose of the strike. ~~{BigCo is incorrect in claiming that "there could be no more probative evidence of International Union's purpose in striking BigCo." (BigCo Brief at 14.) Not only is that fact itself }~~ [That fact, in and of itself, is] not probative of anything~~{, but case law makes it clear substantial additional}~~ [Substantial affirmative] evidence is needed to conclude that a strike is illegal under section 8(b)(4)(i)(A). *See Retail Clerks, Local 770 v. NLRB*, 296 F.2d 368, 373-75 (D.C. Cir. 1961) (ultimate return of employer to multi-employer association does not in and of itself establish strike was improper under 8(b)(4)(i)(A), and court required substantial additional evidence to reach that conclusion); *see also Frito-Lay*, 623 F.2d at 1361 (cannot infer illegal motivation based only on potential effect of particular conduct). This record is devoid of ~~{the needed additional}~~ [any such] evidence.

In addition, ~~{the record reveals that}~~ International Union did not end [all] its ~~{strike}~~ [strikes] simply because ~~{Industrial}~~ [BigCo] met a demand that it ~~{rejoin}~~ [reassign its bargaining authority for the laydown crews to] the Association. International Union had an ongoing dispute with the Association, and that dispute

with Association finally settled in November of 1995. ~~{A month later, Industrial was able to settle its dispute by signing the }~~ **[Over a month later, BigCo unilaterally decided to rejoin the Association and therefore became bound to the new] agreement previously reached by the Association {in December of 1995. (R.E. 321.) International Union's disputes with other BigCo and Industrial units continued, however, and the }** **[with International Union. (R.E. 321.) At that point, there was nothing International Union could do to prevent BigCo from rejoining, and thereby end the laydown-crew labor dispute, even though its disputes with the other BigCo units continued. The]** last strike, by production employees at BigCo's construction materials aggregate plants did not end until **[sometime after]** July of 1997.

~~{These facts do}~~ **[Simply stated, the record does]** not support the District Court's conclusion that all International Union's strike activity was illegal ~~{and a basis for awarding BigCo damages for security costs and lost profits}~~ **[under Section 8(b)(4)(i)(A)].**

C. The District Court Failed to ~~{Engage in}~~ [do] the Proper *Mead* Causation Analysis ~~{Required by Section 303}~~ and Therefore Improperly Awarded Damages for Security Costs and Lost Profits Under Section 8(b)(4)(i)(A).

The District ~~{Court's award of damages to BigCo for International Union's alleged violation of section 8(b)(4)(i)(A) should be reversed because the District}~~

Court did not correctly analyze the issue of causation as required by Section 303 ~~{and}~~ **[as interpreted by]** this Court's decisions. At best, the record supports the specific conclusion reached by the District Court, that International Union's strikes against BigCo and Industrial were intended~~{,}~~ **[merely]** in part~~{,}~~ to cause Industrial to rejoin the Association. (R.E. 484.) ~~{The District Court,}~~ **[But]** having reached this conclusion, ~~{proceeded}~~ **[the lower court was not free]** to award all the lost profits and security costs claimed ~~{in connection with secondary activity}~~ on this "separate and independent" basis. (R.E. 484.)

The District Court erred ~~{in making this damages award}~~ because it did not engage in the required causation analysis. Even if the District Court's liability conclusion is accepted, Industrial is still not entitled to an award of damages. *Mead v. Retail Clerks Int'l Ass'n*, 523 F.2d 1371, 1376 (9th Cir. 1975) (showing that union violated 8(b)(4)(A) and that plaintiff is in class of persons afforded remedy by Section 303 not enough to establish entitlement to damages). ~~{The District Court found that the strike was}~~ **[If International Union's activities were]** only intended "in part" to force Industrial to rejoin the Association. ~~{Therefore, Industrial's}~~ **[the claimed]** lost profits and security costs were at least in part caused by International Union's ~~{legal motivations for the}~~ **[lawful primary]** strike. In such mixed causation cases, damages may only be awarded if the ~~{unlawful objective was a substantial~~

factor in or} **[alleged misconduct “]materially contributed[”]** to the losses. *Mead*, 523 F.2d at 1379. This causation analysis is necessary “to prevent windfall recoveries by employers negligibly affected by a violation and protect the union’s right to strike for [lawful] primary objectives.” *Mead*, 523 F.2d at 1379. The District Court ~~{did not use the Mead analysis and therefore failed to protect International Union's rights by awarding damages for security costs and lost profits.}~~ **[simply ignored the required *Mead* analysis and thereby failed to preserve International Union's federally-protected rights.]**

~~{The record shows that having Industrial rejoin the Association was, at most,}~~
[At most, the allegedly improper cause was]a negligible cause of the ~~{strike}~~
[damages claimed], and the District Court’s award of almost \$3 million ~~{in damages}~~ on that basis is precisely the sort of “windfall” ~~{the Mead analysis is designed to prevent. Having failed to follow this Court’s directives and thereby appropriately balance legitimate union interests with the goal of shielding unoffending employers, the District Court’s judgment should be reversed to the extent it is based on a determination that International Union's allegedly illegal objective serves as an independent basis for an award of damages for security costs and lost profits.}~~ **[Mead meant to prevent.]**

POINT TWO - THE DISTRICT COURT IMPROPERLY AWARDED OVER \$1 MILLION IN DAMAGES FOR ALLEGED ~~{SECONDARY BOYCOTT ACTIVITY}~~ [LOST PROFITS].

Separate from its determination that International Union's strikes were motivated, in part, by an unlawful objective, the ~~{District Court}~~ **[lower court]** also awarded the same lost profits ~~{damages}~~ **[(and security costs)]** based on alleged secondary boycott activity by International Union in violation of section 8(b)(4)(i) and (ii)(B). The evidentiary record, however, does not include ~~{the}~~ evidence of **[a]** broad ~~{patterns}~~ **[pattern]** of identifiable, illegal conduct constituting coercion or threats by International Union ~~{that are}~~ necessary to sustain **[such]** a finding of liability for secondary activity.

~~{The}~~ **[As with the Section 8(b)(4)(i)(A) claim, the]** judgment should also be reversed because the District Court's findings did not meet the substantial factor test articulated in *Mead*. In addition, the specific **[lost profits]** awards made by the District Court should be reversed because the record does not support the liability finding or there is an insufficient causal relationship between the allegedly illegal activity and the claimed lost profits.

A. The Record Does not Include the Requisite Evidence Establishing Liability for Alleged Illegal Secondary Activity.

Contrary to BigCo's assertions, courts do interpret Section 8(b)(4)(ii)(B) to limit its application to situations involving broad patterns of identifiable misconduct

~~{and unfair practices. In asserting that single acts or ambiguous, unclear actions may be a basis for secondary boycott liability,}~~].]BigCo cites *Railing v. United Mineworkers of America*, 445 F.2d 353 (4th Cir. 1971) for the proposition that one instance of secondary activity “creates liability for resulting lost profits.” (BigCo Brief at 24.) The language quoted by BigCo from *Railing* is in fact from a discussion regarding when a cause of action accrues for purposes of limitations and has nothing to do with whether a single ~~{action}~~ **[instance]** can ~~{give rise to a}~~ **[support an ongoing]** claim under Section ~~{8(b)}~~ **[303]**. *Railing*, 445 F.2d at 354. Similarly, BigCo’s citation to *New Beckley Mining*, 307 N.L.R.B. 71 (1991) is unpersuasive~~;~~, ~~as this case does not involve anything approaching the}~~ **[. Here, there was no]** “mass gathering” **[as]** described in *New Beckley*. BigCo’s discussion of *Losli International*, 297 N.L.R.B. 1078 (1990) and *Edward L. Nezelek, Inc.*, 194 N.L.R.B. 579 (1971) ~~{are also unpersuasive, as the}~~ **[is similarly unavailing. The]** activities described in those cases are dissimilar from the activities alleged ~~{in this case. These cases, as a whole, do not}~~ **[here. Indeed, none of BigCo’s cases]** challenge the proposition that ~~{a court should}~~ **[federal courts must]** strictly interpret section 8(b) to protect unions ~~{exercising}~~ **[in]** their **[exercise of]** legitimate bargaining rights.

~~{Moreover,}~~ BigCo **[also]** ignores the Fifth Circuit’s determination in *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316 (5th Cir. 1994) that ~~{to be~~

liable} [liability] for an 8(b)(4)(ii)(B) violation{,“} [requires that] a union {must}[“do more than merely induce or encourage, the union must engage in conduct ‘attended by threats, coercion or restraint.’” *Brown & Root, Inc.*, 10 F.3d at 320-21, citing *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 54 (1964). Many of the District Court’s findings, in contrast, are premised solely on vague references to “problems” or “trouble,” which are insufficient to constitute [such] a violation. See *Teamsters Local 82 (Champion Exposition Services)*, 292 N.L.R.B. 794, 1989 N.L.R.B. LEXIS 47, *8 (1989); *Local No. 695, Laborers Int’l Union (Mautz & Oren, Inc.)*, 209 N.L.R.B. 410, 1974 N.L.R.B. LEXIS 488, *4-5, 14-15 (1974). The few, widely-separated[, independent] events described in the Findings clearly do not rise to the level of {concerted} [a pattern of] union activity necessary to justify imposition of liability. *Brown & Root*, 10 F.3d at 321. In the absence of such facts, the District Court’s imposition of crushing liability in this case should be reversed.

B. The District Court’s Findings Did not Meet the Substantial Factor Test Established in *Mead*.

This Court’s decision in *Mead* requires a showing, unmet by BigCo, that International Union's alleged unlawful conduct[: (1)] “materially contributed’ to [its] injury or was a ‘substantial factor’ in bringing it about, ‘notwithstanding other factors contributed also{.}’[,” and (2) was a material cause or substantial factor in any claimed damages.] *Mead*, 523 F.2d at 1376 (citations omitted). See also

Rainbow Tours, Inc. v. Hawaii Joint Council, 704 F.2d 1443, 1448 (9th Cir. 1983).

[

]The District Court [**also**] erred in awarding damages without segregating out what lost profits or security costs were caused by International Union's lawful activity, ~~and because the record did not include substantial evidence that the allegedly illegal secondary conduct was a material cause or substantial factor in any of BigCo's claimed damages.~~² *Mead* requires the District Court to (1) distinguish

² BigCo also falsely speculates that International Union, frustrated by BigCo's ability to continue full operations despite the strike, was motivated to engage in prohibited secondary activity to achieve its strike aims. This conjecture rests, in part, on BigCo's claims that its operations were unaffected by the strikes. BigCo states its "plants remained in operation, with some plants experiencing only a few minor delays during the first few days of the strike, and BigCo continued to service its customers," (BigCo Brief at 5-6), and BigCo cites pages 419-20 of its Supplemental Record Excerpts in support of that proposition. The cited testimony does not support BigCo's claim that the strike did not disrupt its operations and that it continued to fulfill all customer needs. Instead, the testimony states only that some plants began to operate immediately after the strike started. (S.E. 419-20.) Nothing is cited for the proposition that BigCo operations were unaffected or that BigCo had no difficulties servicing its customers. In fact, BigCo plants were affected by the strike, with production curtailed and some plants closed. (R.E. 125-26, 363, 365.) It is undisputed that the overriding objective of the strike was to require BigCo and/or Industrial to reach new, successor labor agreements

between injury caused by illegal motivation and injury caused by legal motivation and (2) where an injury is caused by multiple motivations, the court must determine that the illegal motive was the “moving cause,” the “but for” cause, or “the major or dominant cause” of the injury. *Mead*, 532 F.2d at 1377 n.7. Thus, where the lawful objective standing alone would have caused the injury, and the unlawful objective would not have caused the injury, there can be no recovery. Applying this standard to the District Court’s specific damages awards indicates that the imposition of lost-profits damages related to alleged secondary activity must be reversed.

C. The District Court’s Specific Lost Profits Awards Should be Reversed Because the Record Does not Support a Finding of Liability or There is an Insufficient Causal Relationship Between the Allegedly Illegal Activity and the Claimed Loss.

The District Court’s specific lost-profits awards are deficient and should be reversed. Contrary to BigCo’s assertion, International Union is not claiming that the District Court was required to believe the testimony of its witnesses to the exclusion of others. On the contrary, International Union is arguing only that when the entire record is examined, it is clear that the District Court erred in awarding lost profits damages for alleged secondary activity. The District Court awarded damages based on ten claims allegedly involving secondary activity -- seven involved alleged threats

with International Union, and that is certainly a lawful objective.

and three involved sporadic incidents of short-duration picketing. Ignoring the wide-spread labor unrest in the region at the time, the District Court awarded over a million dollars in alleged lost profits to BigCo based on these isolated incidents. When the record is examined ~~{as a whole}~~, and ~~{when}~~ the awards ~~{are}~~ subjected to the proper causation analysis, it is clear no award should have been made.

1. The PavingCo Award is Not Supported by the Evidence.

The record does not support the District Court's liability or causation finding in connection with the PavingCo award. *Smith v. American Guild of Variety Artists*, 349 F.2d 975 (8th Cir. 1965), cited by BigCo, does not support the conclusion that, based only on unsubstantiated rumor, damages could be awarded. In fact, the discussion quoted from *Smith* dealt with a claim for contractual interference and not with **[the remedial]** secondary boycott ~~{claims}~~ **[statute]**. *Smith*, 349 F.2d at 983. Here, the award is based on **[unattributed]** rumors and conjecture and not on any facts that could be in any way construed as "threats, coercion or restraint" as required ~~{to establish a violation of 8(b)(4)(B)}~~ **[by 8(b)(4)(ii)(B)]**, *Brown & Root*, 10 F.3d at 320-21. In addition, there is ~~{an insufficient}~~ **[no]** causal connection between the rumors relied upon by BigCo and any lost profits it suffered in connection with this job site. The District Court's award of lost profits should be reversed.

2. The Canyon Award Should be Reversed.

The record also does not support the District Court's single-largest award of lost profits, the Canyon award, and it should be reversed. Liability in connection with this job site is premised on **[statements allegedly made by John Adams, an International Union business agent, who passed away prior to trial. James Madison claims he told Robert Canyon what Adams told him about the strike. The District Court erred in awarding \$564,238.83 on the basis of this prejudicial testimony. BigCo never disclosed the identify of the business representative who allegedly made the statements or the person to whom they were made prior to trial, (R.E. 263, 271, 328-45), and International Union had no opportunity to question Adams about the alleged incident while he was still alive. (R.E. 328-45). The District Court abused its discretion in relying on this testimony because the probative value was outweighed by the prejudice to International Union caused by BigCo's failure to disclose Adams's identity. Fed. R. Evid. 403]** ~~{the hearsay statements of Adams and Madison. Even if Adams's statement to Madison is not considered to be hearsay, Madison's statements to Canyon, where he allegedly conveyed the threats supposedly made by McFarland, the deceased business agent, are obviously hearsay, and those statements are what the~~

~~District Court relied on to connect Canyon's subsequent decision to change suppliers with activity by International Union.~~

~~BigCo's citation to United States v. Kirk, 844 F.2d 660 (9th Cir. 1988) and United States v. Amahia, 825 F.2d 177 (8th Cir. 1987) in support of the District Court's reliance on these statements is unpersuasive and inapposite. Both of these criminal cases involve using statements to demonstrate the effect the statements had on the person hearing them and were not offered for the truth of the matter asserted. Kirk, 844 F.2d at 663, Amahia, 835 F.2d at 181. Here, in contrast, the truthfulness of any statement relayed to Escudero is crucial to the determination of whether anyone from International Union actually made threats or coerced Escudero—without such threats or coercion, of course, there can be no finding of liability, Brown & Root, Inc., 10 F.3d at 320-21. No damages could be awarded because, without a connection between International Union activity and Canyon, there could be no finding that International Union's actions were a substantial cause of Canyon switching suppliers and BigCo losing the business. Mead, 523 F.2d at 1376}. The District Court should not have relied on this testimony{, particularly given BigCo's failure to disclose the identify of Adams, which denied International Union an} [because **International Union had no**] opportunity to question Adams about the alleged incident while he~~

was still alive. (R.E. 328-45.) ~~{By awarding \$564,238.83 on the basis of hearsay statements, the District Court erred.}~~

The District Court's reliance on Adams's alleged statements is also improper because those statements cannot support a finding of liability. In fact, the critical information, that is, what was relayed to Canyon prior to his decision to change suppliers, simply does not support a finding of liability. The record, as cited by BigCo, indicates only that Madison suggested to Canyon that he begin the process of finding another supplier, and does not even include testimony that Madison actually relayed any alleged "threats" to Canyon. (R.E. 119). The record also contains clear evidence that Industrial's inability to produce the required product ~~{was at least in part responsible}~~ **[due to International Union's primary strike at the Valley plant, shutting it down, was at least as much the reason]** for Canyon's decision to change suppliers~~{, and BigCo's assertion that the relayed conversation was the "sole reason" is simply incorrect. (BigCo Brief at 37.) It is undisputed that the Industrial plant that was to supply asphalt to the job site had been shut down due to the legal, primary strike}~~ **[as the once-removed threat]**. (R.E. 117-19, 121-26.) **[BigCo's assertion that the relayed conversation was the "sole reason" is simply incorrect. (BigCo Brief at 37.)]** Canyon testified that before deciding to change suppliers, he had personally seen the plant padlocked. (R.E. 125-26.)

Contrary to BigCo's assertion, there was a significant delay between the Adams-to-Madison-to-Canyon exchange and Canyon's decision to seek an alternate supplier. Adams supposedly made his statements in late July, and at the earliest, Canyon sought information from an alternate supplier some nine days later. (BigCo Brief at 46 n.21; S.E. 594-95.) Canyon himself testified that he did not consider changing suppliers right away, and that it may have been at least *one month* after he heard from Madison before he changed suppliers. (S.E. 72-73; R.E. 121-24.) The alleged Adams-to-Madison-to-Canyon chain of statements, with a lengthy period between the ~~{statement being transmitted to Canyon and his decision to change suppliers, clearly does not establish that}~~ **[statements and]**the decision to change suppliers ~~{was substantially caused by any actions of International Union, and the award must be reversed.}~~ **[clearly militates against a finding of substantial cause.]**

3. International Union Had a Separate Labor Dispute With Jackson That Precludes any Damages Award.

BigCo is also unpersuasive in its efforts to defend the Jackson Paving award. Testimony established that International Union had a separate labor dispute with Jackson, (R.E. 201-02, 399-401), and that any labor actions taken by International Union were in connection with that separate dispute. BigCo's assertion that this argument is somehow inconsistent is ineffective. Monroe testified without contradiction that International Union began picketing the job site because Jackson

failed to follow International Union's dispatch procedures, and when that dispute was resolved, the picketing stopped. (R.E. 201-02, 399-401.) BigCo is not entitled to damages attributable to legitimate, primary activity such as this. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 731-32 (1964) (union may be held liability under section 303 only for injuries proximately caused by illegal activity). The District Court's award of damages in connection with the Jackson job site should be reversed.

POINT THREE - THE DISTRICT COURT'S SECURITY COST AWARD FOR ~~{SECONDARY BOYCOTT ACTIVITY}~~ [ALLEGED SECTION 8(b)(4)(i) and (ii)(B) MISCONDUCT] MUST BE REVERSED BECAUSE VIRTUALLY ALL OF THE SECURITY COSTS WERE INCURRED AT BigCo'S PRIMARY PLANTS.

In addition to imposing liability for all security costs and lost profits under section 8(b)(4)(i)(A) (illegal motive), the District Court also found that all BigCo's claimed security costs were recoverable because they were caused by International Union's secondary boycott activity in violation of section 8(b)(4)(i) and (ii)(B). The District Court erred in making this award because the record establishes that almost all the security costs claimed by BigCo were incurred in protecting BigCo's primary plants, and such costs are not recoverable based on secondary activity.

A. Most of the Security Costs Claimed by BigCo Were for Security at BigCo's Plants, and Those Costs Cannot be Recovered.

International Union does not dispute that some courts have chosen to award security costs as part of damages in certain situations. The cases supporting that proposition, however, do not support an award of damages based on security costs where there is no link between the allegedly illegal actions and the security costs

incurred. None of the cases cited by BigCo support what the District Court did here by awarding security costs incurred as a result of legal primary strike activity.

BigCo's own statements establish that almost all the security costs for which it received a damage award were in fact incurred in connection with, and as a result of, primary strike activity. In preparation for the strike, BigCo asserts that it anticipated unlawful activity (in fact, primary picket line violence at its plants and plant sabotage). Its expectations were allegedly based on its experience with International Union, International Union's reputation and BigCo's knowledge of prior lawsuits against International Union. (R.E. 477.) That is why, according to BigCo's own statements, they hired a security firm experienced in handling strikes. (R.E. 235.)

In its brief, BigCo states that the majority of the security costs consisted of "\$980,787 for additional guards at BigCo plants," (BigCo Brief at 72), but cannot explain how the need for those additional guards was related to International Union's alleged secondary activity, activity that, by definition, could not occur at BigCo's plants. Similarly, BigCo is unable to connect the "support team" or the "response team" to even one **[alleged]** incident of secondary activity. BigCo is left to rely on its assertion that past experiences with International Union caused it to decide, before any strike actually began or before any activities occurred, to incur the security

expenses in anticipation of secondary activity. In effect, BigCo is asking this Court to affirm an award based on this speculation – speculation that turned out to be unwarranted, as none of the security measures were ever employed to deal with any of International Union's alleged secondary activity. In fact, BigCo is actually claiming security costs associated with a legal primary strike, but there is no authority for such an award.

B. The District Court did not Undertake the Required Causation Analysis and Failed to Separate Out Damages Caused by Allegedly Unlawful Activity From Those Attributable to Lawful Primary Activity.

The record does not support the conclusion that the security costs awarded by the District Court were caused by International Union's alleged illegal secondary activity. In determining what damages may be awarded under Section 303 for a violation of Section 8(b), the court must separate out what damages were caused by allegedly unlawful activity from those claimed due to lawful primary activity. *See Rainbow Tours*, 704 F.2d at 1448. Contrary to BigCo's claims, the District Court did not make any effort to separate out damages attributable to primary activity and simply award BigCo all the security costs BigCo claimed. BigCo made no effort to link any of the security costs to any of the incidents it alleged involved illegal secondary activity. Gilliam himself estimated that less than five percent of the response team's time was actually spent at job sites, meaning over 95% of the time

was spent at plant locations were, by definition, only primary activity occurred, and he could not identify even one incident where illegal secondary activity for which BigCo was making a claim caused the dispatching of the response team. (R.E. 306, 302-08.) The District Court's finding cannot be squared with the Section 303 requirement that a causal link be established before damages are awarded, and the award lacks both evidentiary and legal support. The District Court effectively shifted all the expenses allegedly incurred by BigCo due to its premeditated decision to "take a strike," to the detriment of International Union's exercise of its legitimate rights, and that determination must be reversed.

POINT FOUR - THE DISTRICT COURT ERRED IN CALCULATING ITS DAMAGES AWARDS.

BigCo is unable to explain away the numerous discrepancies and errors pointed out by International Union's expert at trial. International Union introduced the only expert testimony on the damages issue. BigCo's post-trial efforts to qualify Lincoln as an expert in its brief are ineffective. (BigCo Brief at 64.) It is undisputed that Lincoln never prepared a damages analysis before, (R.E. 257), and the District Court erred in relying solely on his calculations and dismissing Dr. Grant's corrections, (R.E. 456), without comment.

BigCo also does not effectively answer Dr. Grant's conclusion that Lincoln erred by including labor costs in his calculation of fixed costs for asphalt plants. Lincoln's improbable claim that labor costs in asphalt plants were fixed, no matter how production fluctuated, defies common sense as well as the testimony of BigCo's own witness, Johnson, who noted labor demands actually change from week to week as well as seasonally as production demands change. (R.E. 105-06.)

The District Court's unquestioning acceptance of Lincoln's damages calculation is also questionable considering errors pointed out by Dr. Grant, to which BigCo offered no expert testimony in contradiction. BigCo's efforts to discredit Dr. Grant, the only expert presented at trial, are also unpersuasive. It is clear that the District Court accepted BigCo's calculations without change and failed to include any

of Dr. Grant's unchallenged corrections in its calculations. At the least, the case should be remanded for reconsideration of this error-plagued damages calculation.