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

Advice Memorandum

DATE: September 24, 2008

TO : Alan Reichard, Regional Director
Region 32

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

SUBJECT: Carpenters Local 701
(Matt Construction/Community Medical Center)
Case 32-CC-1562, 1563, 32-CG-64

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(ii)(B) when it posted a banner at the main entrance to a neutral hospital for which the primary employer was constructing a parking garage. We agree with the Region that the charge should be dismissed, absent withdrawal, because the Union's banner was directed only at the primary employer and did not mislead patients and visitors of the hospital that the Union had a labor dispute with the hospital.

The Union has a dispute with Matt Construction (the Employer) stemming from an incident in March 2008 where an Employer official allegedly threatened, shoved, and took documents from a Union organizer. An unfair labor practice charge regarding that incident was settled, pre-complaint, with an informal settlement agreement signed only by the Employer. The Union has since picketed at the Employer's office and at another jobsite where the Employer is working with picket signs stating: "Matt Construction Unfair Labor Practice." The Region has determined that any charge allegations regarding such picketing should be dismissed because this was lawful primary picketing.

The Employer is the general contractor for a project involving construction of a parking structure for a medical office building being built on the Community Medical Center's (the Hospital) property. From August 13 – 26, the Union bannered at the entrance to the Hospital with a 7' x 9.5' sign stating "Matt Construction Unfair to Workers and the Community." The sign was on a PVC frame, adjacent to and within four feet of the main sliding door entrance to the hospital. This entrance is the entrance generally used by patients and visitors. Hospital employees also use this entrance, but use other entrances as well. It is unclear whether the Employer's employees use this entrance, but it would appear unlikely in view of the fact that they are not working in the Hospital but at a separate outdoor construction site behind the hospital.

On each of the days of bannering, 3-6 individuals stood next to the banner and distributed handbills. The handbills stated:

> If **Fresno Community Hospital** Cares about **Our** community, why is **Matt Construction** building the Cornerstone Main Company 2 medical office building on Fresno Community Hospital's property?
>
> **Matt Construction** agreed to post a notice promising it would not physically attempt to confiscate papers or unlawfully push or shove visiting Union representatives in order to resolve charges of violating the **National Labor Relations Act.**
>
> Call Jack Chub CEO Community Regional Medical Center at (559) 459-2425 and Paul Matt CEO Matt Construction in Los Angeles at (562)903-2277 **And tell them that the Fresno community wants contractors building in Fresno to treat the workers fair.**[1]

The handbills had the traditional "we are not asking for any work stoppages or refusals to make deliveries" language, in smaller print, at the bottom.

The handbillers did not patrol back and forth, and their only movement was to offer people handbills as they passed by. There is no evidence that the agents said anything to the handbill recipients. The only evidence of confrontational conduct was a single incident involving a Hospital employee, who testified that a handbiller moved between her and entrance when she had said "No thank you" and had attempted to walk by him. She took the handbill and was then able to pass. The same individual declined the flyer on subsequent days without issue.

On August 13, the first day of bannering/handbilling, a handbiller filmed the activity for approximately one hour. During this time, the Hospital's security director was having a discussion with several police officers, and the videocamera was directed primarily at that discussion.

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[1] The language quoted here is from the most recent version of the handbill. The language was changed in minor ways at some point during the period of bannering. Although Matt Construction is building the parking structure, not the medical building itself, the Region has determined that the Union reasonably believed Matt Construction was responsible for both construction projects.

The Hospital's Communication Specialist, who was also videotaping, approached the Union agents and advised them that federal HIPPA law prohibited the filming of patients or visitors entering or exiting the hospital without their permission. The handbillers assured the Communication Specialist that they were being "respectful" to patients and visitors. There is no evidence of any later videotaping.

We conclude that the Region should dismiss the charge, absent withdrawal, because the Union's bannering was directed only at primary Matt Construction and did not mislead patients and visitors of the Hospital that the Union had a labor dispute with the Hospital.

Under the General Counsel's previously articulated "bannering" theory, union bannering arguably violates Section 8(b)(4)(ii)(B) where the following four factors, viewed together, create an element of "confrontation" with the public or constitute a "signal" to a neutral's customers that they should not cross an invisible picket line: (1) the display of large banners; (2) the presence of individuals supporting the banners; (3) the close proximity of the banners to the targeted neutral employer; and (4) misleading language on the banners.[2] The fourth factor requires statements that would mislead the neutral employer's customers and the general public that the union has a labor dispute with the neutral.[3]

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[2] For a full explication of the General Counsel's bannering theories, see, e.g., Carpenters Locals 184, et al. (Grayhawk Development), Cases 28-CC-971, et al., Advice Memorandum dated August 17, 2004.

[3] See, for example, Carpenters Local 1506 (Eliason & Knuth), Cases 28-CC-939, 28-CP-260, Advice Memorandum dated December 23, 2002; Carpenters Local 209 (Kings Hawaiian Restaurant & Bakery), Case 31-CC-2103, Appeals Minute dated September 25, 2002; Carpenters Local 1506 (Associated General Carpenters, San Diego Chapter), Case 21-CC-3307, Appeals Minute dated August 21, 2002. [*FOIA Exemption 7(A)*

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Here, although the Union displayed a large banner, supported by Union agents,[4] immediately adjacent to the Hospital's main entrance, the banner referenced only Matt Construction and did not suggest that the Union had a labor dispute with the Hospital. The handbills that were distributed accurately identified the nature of the dispute and the identity of the primary employer. The handbillers did not engage in traditional patrolling and engaged in no other confrontational conduct, with the exception of the single isolated instance, discussed above, of momentary "blocking." With regard to the first day's videotaping, which appears to have been done for defensive purposes and which targeted conversations between Hospital security/management and the police, we conclude that it was not so confrontational as to render the Union's otherwise DeBartolo-protected handbilling unlawful. Under these circumstances, the Union's bannering was not arguably tantamount to picketing under the theory presently under consideration by the Board.[5]

Because the Union's conduct was not tantamount to picketing and did not involve a work stoppage, the Union also was not required to provide the Hospital with a ten-day Section 8(g) notice.

Accordingly, the Region should dismiss the charges, absent withdrawal.

B.J.K.

[4] Although the handbillers did not wear Union insignia, the language on the banner and the content of the handbills indicated that this was conduct by a labor organization.

[5] We also note that this case arises in the Ninth Circuit, where the Court of Appeals has rejected the General Counsel's theories of violation in a union bannering case. Overstreet v. Carpenters Local 1506, 409 F.3d 1199 (9th Cir. 2005). Thus, even if the Union's activity was arguably unlawful, we would not be able to secure a Section 10(l) injunction against the bannering activity here.