

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

Advice Memorandum

DATE: November 24, 2008

TO : Rik Lineback, Regional Director
Region 25

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

SUBJECT: SEIU Local 3 (Executive Management Services)
Cases 25-CC-868, 869, 870; 25-CP-213, 214 560-2575-6701
578-2025-6700

These cases were submitted for advice as to whether the Union violated Section 8(b)(4)(B) or Section 8(b)(7)(C) by demonstrating against a non-union cleaning contractor. We conclude that the Union's demonstrations were not confrontational and thus do not violate the Act.

FACTS

Charging Party Executive Management Services ("EMS") is a non-union commercial cleaning company operating in sixteen states, including the area in and around Indianapolis, Indiana. Since 2005, Respondent SEIU, Local 3 has been campaigning to organize janitors in Indianapolis. During the summer and fall of 2008,¹ the Union engaged in the following activities at EMS-serviced buildings in Indianapolis, which gave rise to the instant charges.

August 12 - Market Tower

Approximately 20-25 demonstrators stood in an oval pattern outside the entrance to the Market Tower office building to engage in a 45-minute prayer session. Although the participants used most of the sidewalk, pedestrians were able to walk into and out of the building by skirting around the oval. Union agents did not patrol, handbill, or block ingress to or egress from the building.

¹ All dates are in 2008 unless specified otherwise.

September 4 - Market Tower

Five Union handbillers stationed themselves on the sidewalk outside Market Tower, flanking the main entrance. One individual rang a cowbell. The handbillers generally stayed near the curb, but the individual with the cowbell occasionally walked to a new position. Handbilling lasted less than 45 minutes.

September 12 - IPL Building

Three Union agents handbilled pedestrians on a sidewalk in front of the EMS-serviced IPL Building. The handbillers did not patrol and did not use any noise-making devices.

September 16 - Huntington Plaza

Three handbillers stationed themselves on a sidewalk outside the main entrance to Huntington Plaza, a building that had previously used EMS, but no longer did. Two of the three handbillers wore heavy-gauge linked chains wrapped around their necks. They did not make undue noise, patrol or carry signs. The handbills stated that "EMS Janitors Chained to Injustice."

September 24 - 101 West Ohio

Two individuals handbilled in front of an office building, 101 West Ohio Street, that had recently contracted with EMS to provide custodial services starting in early October. One of the handbillers carried two cowbells, which he occasionally slapped together. Because of the width of the entrance, the handbillers were not blocking ingress or egress. One pedestrian, apparently annoyed at the sound, took one of the cowbells from the Union agents and left with it in a car. After a subsequent two to three hour hiatus, five Union agents returned to the sidewalk in front of the property and handbilled pedestrians. This time, some of the handbillers made noise by banging on empty water-cooler jugs with either a stick or a cowbell. A building tenant called the police, who arrived and told the demonstrators to stop the noise, which they did.

October 1 - Market Tower and 101 West Ohio

Approximately 18-22 demonstrators conducted a 15 minute demonstration on the sidewalk outside the main entrance to Market Tower. Many of the demonstrators banged on metal cans or shook containers filled with rocks. One

individual carried a megaphone, which he used on occasion both to amplify his voice and to engage a siren.² Although the demonstrators stationed themselves along the curb, the placement of two large planters narrowed the width of the sidewalk to about six feet at two points. Nevertheless, the demonstrators did not block access to and from the building. The man with the megaphone occasionally walked back and forth along the line, while the remaining demonstrators were stationary. The demonstration was loud enough to be clearly heard inside the atrium of the building. A man also recorded the demonstration using a tripod-mounted video camera; his identity is not known, and the Union denies that he was their agent.

After about 15 minutes, the demonstrators walked to a nearby building at 101 West Ohio. As at Market Tower, they lined the curb-side of the sidewalk, which again narrowed to about 6-8 feet in width because of the placement of two large planters. They chanted pro-Union slogans, shook noisemakers and beat on drums, and handbilled interested pedestrians. The individual with the megaphone used it to amplify his voice (but not to sound the siren), until area police told him to stop. As at Market Tower, the demonstrators were stationary, with the exception of the leader with the megaphone who walked along the line of participants. One witness stated that the noise was loud enough inside the building to be distracting, but did not prevent conversation. Another witness stated that individuals were able to enter and exit the building as normal. After approximately 50 minutes, the chanting and noisemaking subsided, some of the demonstrators departed and those remaining engaged in a 10-minute prayer meeting.

October 6 - 101 West Ohio

Five to eight Union agents held a lunchtime press conference on a sidewalk outside 101 West Ohio. They placed about ten large trash bags around the building entrance to advertise their charge that EMS treats its employees "like trash." Neither the participants nor the garbage bags blocked access to the building and the participants did not patrol or make noise.

ACTION

We conclude that the Union's demonstrations were not confrontational and thus do not violate the Act. For

² The individual apparently chanted such things as, "no justice, no peace," "EMS is unfair," and "justice for janitors."

purposes of Sections 8(b)(4) and 8(b)(7), the touchstone of coercive Union conduct is an element of confrontation that serves to keep the public or neutral employees away from a targeted employer.³ In determining whether unions have engaged in unprotected activity, the Board looks to whether, under the totality of circumstances, conduct rather than speech was used in order to induce a sympathetic response. The presence of picket signs and/or patrolling is not the sine qua non of a violation.⁴ Rather, conduct designed to confront the viewer with an implicit appeal to take action can include the presence of mass activity involving crowds that far exceed the number of people necessary for free speech activity⁵ or the making of excessive noise.⁶ Conversely, a demonstration may be nonconfrontational even though it is held in close proximity to a building entrance.⁷

³ Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965) ("[o]ne of the necessary conditions of picketing is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises").

⁴ Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1965) (pure handbilling violated Section 8(b)(7)(B), where followed by, but not contemporaneous with, placard picketing).

⁵ Mine Workers (New Beckley Mining), 304 NLRB 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (unlawful mass demonstration where 50-140 union supporters milled about in parking lot outside neutral facility while shouting antagonistic slogans at replacement workers); Service & Maintenance Employees Union No. 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)").

⁶ See, e.g., Carpenters (Society Hill Tower Owners' Ass'n), 335 NLRB 814, 826 (2001) (union violated 8(b)(4) by its repeated broadcasts at extremely loud volumes aimed at residential building); Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 746 (1993) (excessive noise, when combined by attempted forced entry into building, marching, display of banner and temporary blocking of access, deemed confrontational).

⁷ See UNITE (Amedic System, Inc.), Case 12-CC-1244, Advice memorandum dated August 7, 1998 (union demonstration

We conclude here that the Union's demonstrations in Indianapolis during the relevant time period involved no confrontation. At no time did the Union use traditionally confrontational elements, such as placard signs or banners. Further, Union handbillers and demonstrators in general were stationary and did not patrol the perimeters of or entrances to the targeted buildings.⁸ Moreover, at no time did Union agents station themselves on sidewalks in order to block access to the buildings. Rather, even during the October 1 demonstrations involving a group of 18-22 individuals, the demonstrators lined the sidewalk near the curb. According to a witness, their placement, close to the curb without standing in the street itself, created a space wide enough for pedestrians to access the building. Furthermore, although Union agents on that date and one other date shook noisemakers, banged on drums and/or used a megaphone, the evidence does not suggest that the noise generally prevented individuals from transacting business in the targeted buildings. Inasmuch as the ambient noise was designed generally to publicize the Union's dispute without being directed at individuals, we do not find it to be confrontational.⁹

Since the handbilling and other demonstrations did not act as a signal to induce those faced with the Union's conduct to take the kind of action which traditional picket

involving approximately 40 individuals lining public sidewalk in front of targeted office building not confrontational in absence of patrolling, blocking or evidence of intention to confront public); SEIU Local 77 (Westinghouse Electric Co.), Case 32-CC-1261, Advice Memorandum dated October 16, 1989 (where handbilling accompanied by bullhorns and signs displayed by 10 to 20 demonstrators occurred near building entrance for less than one hour on a few occasions during lunch time, no violation found since the demonstration otherwise imposed no burden on access to the building).

⁸ The movement of a single individual, the apparent leader on October 1, in order to direct the otherwise stationary demonstrators did not rise to the level of coercive patrolling.

⁹ See, e.g., SEIU Local 525 (General Maintenance Co.), 329 NLRB 638, 665, 683 (1999), enf'd mem. 2002 WL 31724293 (9th Cir. 2002) (rally near building entrance by 40-50 individuals, which included loud chanting and use of noisemakers, was not confrontational and thus not unlawful picketing).

lines are expected to invoke, we conclude that they cannot be enjoined as unlawful.¹⁰ Accordingly, the Region should dismiss the charges, absent withdrawal.

B.J.K.

¹⁰ We further agree with the Region that the Union did not violate Sections 8(b)(4) or 8(b)(7) by engaging solely in handbilling activities, wearing either street clothes or a fanciful costume such as chains. And the assertedly symbolic act of placing 9-10 trash bags on a sidewalk as props during the Union's October 6 press conference was not confrontational in the absence of "inconvenience [to] tenants or others entitled to the peaceable use of the buildings." SEIU Local 525 (General Maintenance), supra, 329 NLRB at 680 (coercive union conduct of emptying shredded paper from trash bags into lobbies of neutral office buildings to dramatize janitors' concerns).