

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

Advice Memorandum

DATE: June 30, 2006

TO : Alvin P. Blyer, Regional Director
Region 29

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

SUBJECT: Laborer's Local 78
(Modell's Sporting Goods)
Case 29-CC-1522

This case was submitted for advice as to whether the union's conduct at the entrances to two of the Employer's stores, which included the deployment of an inflated rat and at times an inflated gorilla in conjunction with handbilling directly in front of the entrances, violated Section 8(b)(4)(i) and/or (ii)(B).

We conclude that, based on the facts set forth in the Region's Request for Advice, the totality of the Union's conduct was confrontational and amounted to unlawful inducement and secondary picketing, and that the Union therefore violated Section 8(b)(4)(i) and (ii)(B).

A. The Union's Conduct Violated Section 8(b)(4)(i)(B)

Section 8(b)(4)(i) of the Act proscribes inducing or encouraging employees of a neutral employer to strike. The words "induce or encourage" are broad enough to include every form of influence and persuasion.¹ The provision thus proscribes communications that "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer."²

¹ Electrical Workers IBEW Local 501 (Samuel Langer) v. NLRB, 341 U.S. 694, 701-02 (1951). See also, Service Employees Local 525 (General Maintenance Co.), 329 NLRB 638, 680 (1999) (by targeting tenants and other neutrals, union sought to induce or encourage employees to withhold their services).

² Los Angeles Bldg. & Constr. Trades Council (Sierra South Development), 215 NLRB 288, 290 (1974). See also Operating Engineers Local 12 (Hensel Phelps), 284 NLRB 246, 248 n. 3 (1987) ("signal picketing" is the term used to describe activity short of a true picket line that acts as a signal

"Inducements" include confrontations with employees at employee entrances, as well as more subtle "signals" such as using signs or symbols at employee entrances to advise employees that a labor dispute exists.³

Here, at both locations, the Union deployed a large, inflated rat,⁴ a well-known symbol of labor unrest, with a union sign attached and/or accompanied by Union agents with Union insignia, at the entrance used by employees and delivery personnel;⁵ handbilled aggressively; and shouted to store personnel and customers. This conduct signaled to neutral employees that the Union had a dispute with the

to neutrals that sympathetic action on their part is desired by the union) (citation omitted).

³ Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 562 n. 2, 571-576 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (union supporters standing near picket sign at neutral gate signaled employees); Electrical Workers Local 98 (Telephone Man), 327 NLRB 593, 593 and n. 3 (1999) (finding "signal picketing" where, among other things, union agent stood near neutral gate and wore observer sign that flipped over to reveal same sign being used by union picketers at primary gate); Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (union signaled employees when its agents stuck two picket signs in a snowbank and monitored the employer's facility from a nearby car); Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987) (union signaled employees by placing signs at or near one or more of the entrances to common situs so that they could be read by anyone approaching them); Construction & General Laborers Local 304 (Athejen Corp.), 260 NLRB 1311, 1319 (1982) (union signaled employees by placing signs on safety cones, barricades, and on jobsite fence).

⁴ The rat was used consistently at the Steinway Street store and was used on alternate days at the Chambers Street store.

⁵ See, e.g., San Antonio Community Hospital v. Southern California District Council of Carpenters, 125 F.3d 1230, 1236 (9th Cir. 1997). See also, Sheet Metal Workers, Local 15 (Brandon Regional Hospital), Case 12-CC-1258, Advice Memorandum date April 4, 2003; Local 79, LIUNA (Callego Development Corp.), Cases 2-CC-2546, et al., Appeals Minute dated January 24, 2003. We note that the Modell's employees, who were represented by another union, were likely well-aware of the meaning of the rat "signal."

Employer, and that the Union wanted employees, those making deliveries, and other employees providing services to the Employer to take sympathetic action.⁶ Such conduct could reasonably be expected to induce or encourage employees to engage in a work stoppage within the meaning of Section 8(b)(4)(i).⁷

The fact that no employee refused to work, and no deliveries to the stores were disrupted, does not require a different conclusion. The Board, with the approval of the courts, has long held that success or failure of inducement is immaterial to the finding of 8(b)(4)(i) violations.⁸ Thus, even if there is no evidence that any employee actually withheld services from the Employer, the Union's conduct here constituted inducement and encouragement under Section 8(b)(4)(i)(B).

We likewise conclude that the Union's disclaimer at the bottom of its handbill does not immunize the Union from liability for its inducement of employees.⁹ Indeed, the "signal" conveyed by the Union's use of the rat and other conduct might well cause an employee to decide to honor the Union's invisible picket line before he or she received a handbill.

B. The Union's Conduct Violated Section 8(b)(4)(ii)(B)

Section 8(b)(4)(ii) proscribes picketing and "all [union] conduct . . . inten[ded] to coerce, threaten, or

⁶ Indeed, on one occasion, Union agents engaged in a conversation with a store employee wherein they specifically asked her why she continued to work at Modell's in view of the information the Union was providing regarding Modell's use of a non-union asbestos removal contractor.

⁷ Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996).

⁸ See, e.g., Teamsters, Local 505 (Carolina Lumber), 130 NLRB 1438, 1440 (1961) (citations omitted); Operating Engineers, Local 150 (Hamstra Builders), 304 NLRB 482, 484 (1991), citing Carpenters Local 33 v. NLRB, 873 F.2d 316, 322 (D.C. Cir. 1989); Teamsters, Local 85, 243 NLRB 665, 666 (1979) (citations omitted).

⁹ See, e.g., NABET Local 31 (CBS, Inc.), 237 NLRB 1370, 1376 (1978), enfd. 631 F.2d 944 (D.C. Cir. 1980) (disclaimer at bottom of handbill was a "self-serving disavowal" given the manner in which the handbill was distributed).

restrain third parties to cease doing business with a neutral employer"10 Although union picketing usually involves individuals patrolling while carrying placards, the Board has long held that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.¹¹ Rather, the essential feature of picketing is the posting of individuals at entrances to a place of work.¹² In addition, the Board has stated that "[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."¹³

Mere persuasion of customers not to patronize neutral establishments is not, in and of itself, coercion within the meaning of Section 8(b)(4)(ii)(B). On the contrary, the Supreme Court in DeBartolo II¹⁴ concluded that a union's peaceful distribution of area standards handbills urging a

¹⁰ Teamsters Local 122 (August A. Busch & Co.), 334 NLRB 1190, 1204 (2001) (citations omitted), enfd. 2003 WL 880990 (D.C. Cir. 2003). See also Trinity Maintenance, above, 312 NLRB at 743 (citations omitted).

¹¹ See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Carpenters Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

¹² Mine Workers District 2 (Jeddo Coal Co.), 334 NLRB 677, 686 (2001); Service Employees Local 87 (Trinity Building Maintenance), 312 NLRB at 748; Carpenters Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB at 394. See also United Mine Workers District 12 (Truax-Traer Coal), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971) (finding picketing within the meaning of 8(b)(7)).

¹³ Chicago Typographical Union 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964). See also Service & Maintenance Employees Local 399 (William J. Burns Intl. Detective Agency, Inc.), 136 NLRB 431, 437 (1962) (handbillers impeded customer access to neutral employer's premises in a manner that also included element of physical restraint).

¹⁴ Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568 (1988).

consumer boycott of neutral employers did not constitute "restraint or coercion" under Section 8(b)(4)(ii)(B). The Court noted that there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements.¹⁵ Thus, because of the First Amendment considerations, the Court interpreted the phrase "threaten, coerce, or restrain" with "'caution,'" and not with a "'broad sweep,'" to exclude non-picketing activities partaking of free speech.¹⁶ On the other hand, unlike constitutionally protected handbilling, "picketing" and like conduct causes those who approach a location to take some sympathetic action without inquiring into the content of the information being disseminated.¹⁷

In determining whether employees are engaged in DeBartolo handbilling or (ii) coercion, the Board looks to whether, under the totality of the circumstances, a union is using conduct, rather than speech, to induce a sympathetic response. For example, because of its confrontational and coercive nature, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute "a form of picketing."¹⁸ The photographing of neutrals as they pass through an entrance has also been found to be an indicium of picketing in circumstances where it is found to be coercive.¹⁹ And, as discussed above, the Board has found that union supporters patrolling, or signs posted near a facility's entrance, may constitute picketing

¹⁵ 485 U.S. at 574-77.

¹⁶ Id. at 578 (quoting NLRB v. Drivers, 362 U.S. 274, 290 (1960)).

¹⁷ See Teamsters Local 688 (Levitz Furniture Co.), 205 NLRB 1131, 1133 (1973).

¹⁸ Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (finding mass picketing in violation of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees). See also Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB at 218.

¹⁹ See General Service Employees Union Local 73 (Andy Frain), 239 NLRB 295, 306, 307 (1978) (finding union's handbilling was picketing that violated 8(b)(4)(i) and (ii)(B) where union, which had previously engaged in picketing, distributed handbills, displayed signs in parked cars, and photographed neutrals).

under certain circumstances.²⁰ In LEROF (The Ranches of Mt. Sinai),²¹ the Board recently held that two or three union agents walking back and forth across the employer's entrance, to distribute handbills to pedestrians and passing cars, were in essence "patrolling" and creating a barrier similar to a picket line.²²

Here, we conclude that, on the whole, the Union's conduct at the Chambers Street and Steinway Street stores on various occasions in May was confrontational and constituted "picketing." Thus, the deployment of a large, inflated rat or gorilla²³ within 4-7 feet of the only entrance on a crowded city street, the agents' pacing back and forth across the entrance to deliver handbills to a steady stream of pedestrians, the shouting at customers entering the stores, and the occasional impeding of access and physical touching of customers, together establish that the Union was using conduct, rather than speech, to induce a sympathetic response. This conduct, considered in its entirety, created a "gauntlet" that forced pedestrians to confront the Union in order to enter the building.

²⁰ See, e.g., Hoffman Construction, 292 NLRB at 562 n. 2, 571-576; Telephone Man, 327 NLRB at 593 and n. 3; Woodward Motors, 135 NLRB at 851, fn. 1, 857 ; Calcon Construction), 287 NLRB at 573; Athejen Corp., 260 NLRB at 1319.

²¹ 346 NLRB No. 105 (2006).

²² See also Local 78, Asbestos, Lead and Hazardous Waste Laborers (Hampshire House), 2-CC-2581, Advice Memorandum dated June 25, 2003 (posting of inflated rat at entrance and assertive handbilling by union agents, who sometimes walked in an elliptical pattern around the rat and yelled at pedestrians, created a gauntlet that unlawfully confronted customers).

²³ Although an inflated gorilla, as was used on alternate days at the Chambers Street store, is not commonly associated with labor disputes, its placement near the entrance helped the Union create a gauntlet effect and contributed to the confrontational nature of the Union's handbilling.

Accordingly, the Region should issue complaint, consistent with the above analysis, alleging that the Union violated Section 8(b)(4)(i) and (ii)(B).

B.J.K.