

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

Advice Memorandum

DATE: September 15, 2006

TO : Celeste Mattina, Regional Director
Region 2

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

SUBJECT: Plumbers/Steamfitters HVACR Service Local Union 21
(Lafarge North America, Inc.)
Cases 2-CC-2677; 2-CD-1116

Building & Construction Trades
Council of Westchester and Putnam Counties
(Lafarge North America, Inc.)
Cases 2-CC-2678; 2-CD-1117

Millwright and Machinery Erectors Local Union 740
(Lafarge North America, Inc.)
Cases 2-CC-2679; 2-CD-1118

These cases were submitted for advice as to whether the Union's conduct during a mass rally violated Section 8(b)(4)(B) and 8(b)(4)(D) of the Act. We conclude that the Union's entire course of conduct constituted confrontational conduct tantamount to picketing in violation of Section 8(b)(4)(B). We further conclude, in agreement with the Region, that the 8(b)(4)(D) allegations should be dismissed, absent withdrawal.

Section 8(b)(4)(B)

Traditional union picketing involves individuals patrolling while carrying placards attached to sticks. However, the Board has long held that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding union conduct to be the equivalent of picketing.¹ Rather, 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."² Along the same lines, "[t]he

¹ 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 Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."³

Picketing involves a "'mixture of conduct and communication,'" and does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'"⁴ Picketing is meant to cause those approaching the location of the demonstration to take some sympathetic action, such as not entering the facility involved. The Board has also recognized that the "conduct element" in picketing invokes a response regardless of any message.

In determining whether employees are engaged in DeBartolo handbilling or picketing, 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 picketing.⁵

² Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

³ Stoltze Land & Lumber Co., 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

⁴ See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 580 (1988), quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

⁵ See, e.g., 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); 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

Here, the totality of the Union's actions demonstrates that the Union was using conduct, not just speech, to evoke a sympathetic response, and to coerce the neutral employer Lafarge. The presence of more than 300 people demonstrating in the May 24, 2006, rally, many in the street in front of the entrances to Lafarge's facility, far exceeded the number of people necessary to convey the Union's message, and thus involved an element of conduct beyond pure DeBartolo-protected speech.⁶ In addition, the constant driving of a truck up and down the street in front of the entrances with the misleading banner stating "Shame on Lafarge for using non-union subcontractors" could have created the false impression that the Union had a primary dispute with Lafarge itself, and simulated the kind of patrolling used in a traditional picket.⁷ Finally, the four 20-foot-tall inflatable balloon figures immediately adjacent to a neutral gate, albeit also near the primary gate - a rat, a cat choking a construction worker, and two pigs -- also could have sent the misleading message that there was a primary labor dispute with the neutral employer and that the public and employees should stay away. This conduct, considered in its entirety, created a "gauntlet" that forced pedestrians and employees to confront the Union in order to enter Lafarge's facility and was tantamount to picketing even though it did not utilize message-bearing

marchers engaged in patrolling (far more than required for handbilling or publicity purposes)"); Truax-Traer Coal, 177 NLRB at 218 (finding picketing where approximately 200 union agents arrived at the worksite and congregated around or in their parked cars).

⁶ While the presence of four police officers may have kept the protesters from completely blocking the street and the entrances to the facility, it is clear that the flow of traffic was to some extent impeded by the numbers of demonstrators and cars present in the street, along with the constant driving up and down the street in front of the entrances to Lafarge's facility of the truck with the "Shame on Lafarge" banner on its side.

⁷ Compare International Longshoremen's Assoc. (Disney Cruise Line), 12-CC-1269, Advice Memorandum dated January 13, 2004 (finding no conduct tantamount to picketing where union truck pulled a trailer holding large rat caricature along public highways that led to other businesses as well as to Disney World entrances, stopped only at stop signs and in parking lots of non-Disney businesses, and displayed signs truthfully describing the nature of the primary dispute).

placards.⁸ Under all these circumstances, we conclude that the Union was engaged in confrontational conduct tantamount to picketing of a neutral employer in violation of Section 8(b)(4)(B) of the Act.

Section 8(b)(4)(D)

We agree with the Region that that the 8(b)(4)(D) allegations should be dismissed, absent withdrawal. Section 8(b)(4)(D) of the Act prohibits conduct which forces or requires any employer to "assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . ." In order to adjudicate a dispute pursuant to Section 10(k) of the Act, the Board must determine that (i) there are "competing claims for the work;" (ii) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (iii) the parties have not agreed upon a method for voluntary adjustment of the dispute.⁹

In the instant cases, there are no "competing claims for the work" within the meaning of Section 8(b)(4)(D). Rather, the Union is straight-forwardly protesting the choice of non-union subcontractors in the construction project taking place at Lafarge's facility, seeking to coerce Lafarge, a neutral employer, to exert pressure on its general contractor, PCL, to cease doing business with these non-unionized subcontractors and instead to subcontract to unionized entities. This secondary object, of course, is already the basis for the 8(b)(4)(B) complaint authorized here. We recognize that the cease-doing-business-with object desired by the Union would have the ancillary effect of displacing some employees and giving employment to others. That ancillary effect, however, does not itself transform a traditional secondary labor dispute over subcontracting into a jurisdictional or work assignment dispute. Significantly, the Union has made no demand, either directly or indirectly, that the subcontractors themselves assign any of their work to Union members.¹⁰ Thus, while the Union's conduct violated Section

⁸ See, e.g., Trinity Building Maintenance, 312 NLRB 712, 748 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996).

⁹ See, e.g., Bakery, Confectionery and Tobacco Workers Local 205 (Metz Baking Co.), 339 NLRB 1095, 1096-1097 (2003).

¹⁰ We recognize that the Union previously sought a project labor agreement requiring the use of unionized subcontractors prior to the commencement of construction

8(b)(4)(B), as set forth above, we agree with the Region that there is no violation of Section 8(b)(4)(D).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union's entire course of conduct constituted confrontational conduct tantamount to picketing in violation of Section 8(b)(4)(B). The Region should dismiss, absent withdrawal, the allegation that the Union's conduct violated Section 8(b)(4)(D) of the Act.

B.J.K.

activity. This lawful effort to achieve a Section 8(f) contract covering the construction project had a primarily representational object, however, and is not itself sufficient to establish a jurisdictional claim for work in violation of Section 8(b)(4)(D).