

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

Advice Memorandum

DATE: September 25, 2006

TO : Celeste Mattina, Regional Director
Region 2

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

SUBJECT: Local 32BJ, SEIU 560-2575-0000-0000
(Copstat Security, LLC) 560-2575-6700-0000
Cases 2-CP-1074, 2-CC-2682, 578-2000-0000-0000
and 2-CB-20804 578-2025-6700-0000
578-4025-0000-0000

This case was submitted for advice as to whether the noise generated from the Union's area standards demonstrations staged outside neutral places of business, including the beating of plastic drums and whistle blowing, was so excessive as to amount to coercion within Section 8(b)(4)(ii)(B).

We conclude that the Union's noisemaking activities during three Union demonstrations on June 14, 20, and 21, 2006, which resulted in police action to first interdict excessive noisemaking and then to arrest the noisemaking demonstrators, amounted to restraint or coercion within Section 8(b)(4)(ii)(B). [*FOIA Exemption 5*]

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FACTS

¹ [*FOIA Exemption 5*]

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Copstat employs the guards who provide security services at the Empire State Building in New York City. SEIU, Local 32BJ (Union) represents building service and maintenance employees in the New York City area. The Union represents and admits to membership nonguard employees.

In early 2006,² the Union staged demonstrations in front of the Empire State Building in an effort to organize and gain recognition for the Copstat security guards. Copstat filed unfair labor practice charges against the Union's Empire State Building demonstrations, including a Section 8(b)(7)(C) allegation that the Union cannot lawfully gain recognition for the Copstat guards because the Union is a "mixed" guard and nonguard union. During the Union's Empire State Building demonstrations, the Union engaged in noisemaking activities including banging on plastic and metal containers.

On February 27, Empire State Building owners filed a complaint in state court alleging that the Union was creating a private nuisance with these noisemaking activities. The court issued a temporary restraining order enjoining the "banging racket" created by the Union. On April 5, the court issued a preliminary injunction enjoining the Union from noise making activities, including the beating of drums, within 150 feet of the Empire State Building. The Union has appealed that injunction.

Peter Malkin is the principal owner of the Empire State Building and is also the principal owner of a real estate firm with offices on the 26th and 48th floors of the Lincoln Building in New York City. The Lincoln Building is a 55-story commercial building with main entrances on 42nd Street and 41st Street. The Lincoln Building security guards are employed by American Commercial Security Service and are represented by Allied International Union. No Copstat guards work at the Lincoln Building.

From mid-May through July 11, the Union staged in front of Lincoln Building entrances nine separate demonstrations lasting about 30 to 45 minutes each involving 10 to 20 participants. Demonstrators handed out flyers that protested the wages and other conditions of employment of the Copstat security guards at the Empire State Building. The flyers displayed the Union's logo and directed

² All dates hereafter occurred in 2006 unless noted otherwise.

passersby to contact and urge Peter Malkin to raise the standards of the Empire State Building security guards.³

On May 17, the first demonstration took place at the Lincoln Building. At about 10:30 a.m., 20 demonstrators stood approximately 30 feet from the 42nd Street entrance while chanting and distributing flyers. On June 5, 8, and 12, at about 3 p.m., demonstrators appeared at both the 41st and 42nd Street entrances, distributed flyers, chanted, beat on drums, and blew whistles. On June 5, a Lincoln Building tenant complained about excessive noise and the police were called to the location. Police officers did not take any action to halt the noisemaking activity on this date.

On June 14, at about 9:45 a.m., 15 to 20 demonstrators gathered near the 42nd Street entrance. The demonstrators chanted, handbilled, beat on plastic drums, and blew whistles. Police were summoned and officers took action to halt the drumming and whistle blowing.

On June 20, at about 1:20 p.m., 10 to 12 demonstrators gathered on the sidewalk in front of the 42nd Street entrance. The demonstrators distributed flyers and chanted while two demonstrators beat on plastic drums. The police were summoned and officers arrested the two drum-beating demonstrators. The demonstration ceased shortly thereafter.

On June 21, at around 10 a.m., 10 to 12 demonstrators gathered at the 42nd Street entrance. They distributed flyers and chanted while two demonstrators beat on plastic drums. Police arrived and officers arrested the two drummers, charging them with disorderly conduct and unreasonable noise.

On June 30, at around 11 a.m., 12 demonstrators gathered outside of the 42nd Street entrance. They distributed flyers and chanted. The police arrived but no arrests were made. Finally, on July 11, at about 4:15 p.m., 12 demonstrators gathered in front of the 42nd Street entrance. The demonstrators handbilled and chanted, "Hey! Ho! Malkin must go!" The police were not summoned.

Since July 11, there has been no Union activity at the Lincoln Building.

³ The demonstrators did not patrol the Lincoln Building entrances during the demonstrations, and there is no evidence of any cessation of work or of deliveries.

ANALYSIS

We conclude that, complaint should issue, absent settlement, alleging that the Union's excessive noisemaking activities outside the Lincoln Building during the June 14, 20, and 21 demonstrations amounted to coercive conduct in violation of Section 8(b)(4)(ii)(B).

Section 8(b)(4) forbids a union from coercing, threatening or restraining any person for a secondary object.⁴ "Coercion" has been defined as a disruption of the neutral employer's business.⁵ Union conduct does not have to accomplish the desired disruption in order to be coercive within Section 8(b)(4)(ii)(B).⁶

We first conclude that the Union's demonstrations at the Lincoln Building were in support of a secondary object. The Union's labor dispute is with Copstat, who employs the Empire State Building security guards. The Union's Lincoln Building demonstrations sought to pressure Peter Malkin, a Lincoln Building tenant and principal owner of the Empire

⁴ NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688-689 (1951). See also NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58, 68 (1964) (whether a particular activity is prohibited under Section 8(b)(4) depends upon the "coercive nature of the conduct, whether it be picketing or otherwise"); Pye v. Teamsters, Local 122, 875 F.Supp. 921, 927 (D. Mass. 1995), enfd. 61 F.3d 1013 (1st Cir. 1995) ("[c]oercion can take many forms and is often most effective when it is very subtle").

⁵ NLRB v. Local 825, Intern. Union of Operating Engineers, 400 U.S. 297, 304-305 (1971). See also Carpenters, Kentucky State Dist. Council (Wehr Constr., Inc.), 308 NLRB 1129, 1130 n.2 (1992) ("'coercion' means 'non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute'"), quoting Sheet Metal Workers, Local 48 v. Hardy Co., 332 F.2d 682, 685 (5th Cir. 1964).

⁶ Mineworkers District 29 (New Beckley Mining), 304 NLRB 71, 73 (1991), enf. 977 F.2d 1470 (D.C. Cir. 1992) ("[a]lthough our inquiry must be based on the intent, rather than on the effects of the union's conduct . . . , the union's intent is measured as much by the necessary and foreseeable consequences of its conduct as by its stated objective . . . we look to the 'totality of the circumstances' to determine whether the union's conduct demonstrates an unlawful purpose").

State Building, in his business dealings with Copstat. Union chants were directed at Peter Milliken and Union flyers invited passersby to contact and urge Peter Malkin to raise the standards of the Copstat guards. All the other businesses within the Lincoln Building were also neutrals in the Union's area standards dispute with Copstat. We therefore conclude that the Union's demonstrations violated Section 8(b)(4)(ii)(B) if they amounted to restraint or coercion.

In Society Hill Towers, the Board adopted the ALJ's conclusion that the union's broadcast of an area standards message to neutral buildings and their tenants at "excessive volume levels" constituted coercive conduct within the meaning of Section 8(b)(4)(ii)(B).⁷ At one complex of buildings in that case, Society Hill Towers, the union had an area standards dispute with a contractor providing carpeting renovation in the complex's residential buildings. On 48 dates between June 15 and October 7, the union used multiple amplified sound systems, directed at the building, to broadcast the union's area standard message. The building manager received hundreds of tenant complaints; the noise level within the building was compared to the building's fire alarm system. Whenever the building manager summoned a city noise pollution inspector, union lookouts spotted their arrival in time to allow the union to turn down the volume. Inspectors were able to obtain some accurate readings, however, and issued three civil citations to the union for violations of a city ordinance. The union appealed all the citations.⁸

The ALJD, adopted by the Board, first found that the union's broadcasts at both buildings encompassed secondary objectives because they sought to pressure the building tenants and owners who were neutrals in the union's area

⁷ Society Hill Towers, 335 NLRB at 827.

⁸ At another residential building in that case, the Versailles, the union had an area standards dispute with a contractor replacing windows. For around 10 days, the union similarly used an amplified sound system to broadcast the area standard message at this building; the manager received two dozen complaints; the noise level was compared to a television set turned up to maximum volume. When the Versailles manager summoned city noise authorities, the union also used lookouts to turn down the volume. The city official nevertheless issued one noise pollution citation, which the union appealed.

standards disputes. The ALJ then concluded that the amplified sound broadcasts amounted to Section 8(b)(4)(ii) restraint or coercion because they were operated at "excessive volume levels." Id. at 827. In finding the sound levels excessive, the ALJ declined to rely upon the noise pollution civil citations because they were being appealed. The ALJ instead found that the union's system of using lookouts to spot arriving noise inspectors "constituted probative evidence that [the union] was fully aware that its broadcasts were being conducted at excessive volume levels." Id. The ALJ also relied on tenant complaints comparing the noise volume to other excessive volume levels.⁹

We conclude that the Union's noisemaking on June 14, 20 and 21 constituted excessive noise levels amounting to 8(b)(4)(ii)(B) coercion in the same manner as did the amplified broadcasts in Society Hill Towers. The Board found coercively excessive noise levels in that case based on tenant complaints and the union's lookout system, which established that the union knew its broadcast level were excessive. The Union here also clearly knew that its noisemaking was excessive. Police officers on these three days first acted to interdict the Union's noisemaking and then arrested the noisemakers. Moreover, the Union's similar noisemaking directly at the Empire State Building had recently been enjoined as a public nuisance. The Union's moving of this "banging racket" away from that building, to avoid the effect of that injunction, is additional evidence that the Union was knowingly creating excessive noise levels.

[FOIA Exemption 5

⁹ "Anyone who has flinched when someone yells in his ear has done so because he has been subjected to force ... In this case, the tenants ... [were] forced to conduct their business in ways other than that which they would have preferred, forced to complain to managers of their buildings, forced to complain to the police and noise-pollution authorities, and generally discomfited and distracted from their ordinary and peaceful pursuits, all because of the Respondent's broadcasting that was conducted at excessive volume levels." Id. At 829.

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Accordingly, the Region should issue a Section 8(b)(4)(ii)(B) complaint, absent settlement, alleging that the Union's excessive noisemaking activities outside neutral businesses during the June 14, 20, and 21 demonstrations amounted to secondary, coercive conduct in violation of Section 8(b)(4)(ii)(B).

B.J.K.

¹⁰ [*FOIA Exemption 5*

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