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

Advice Memorandum

DATE: October 22, 2008

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: Dallas-Ft. Worth Professional Musicians Association, Local 72-147; Musicians Union of Las Vegas, Local 369; American Federation of Musicians AFL-CIO
Case 16-CC-735

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The Region submitted this case for advice on whether (1) the Union violated Section 8(b)(4)(i)(ii)(B) when it advised the Dallas Symphony Orchestra that it would engage in consumer picketing and handbilling of upcoming concerts performed jointly by the Orchestra and the Employer because of a labor dispute between a sister local and the Employer, and when it advised the Orchestra that its employees would not perform with the Employer, and (2) whether the Union, its sister local, and/or the international violated Section 8(b)(4)(i)(ii)(B) by placing the Employer on the international's "unfair list."

We agree with the Region that the Union violated Section 8(b)(4)(ii)(B) by threatening to engage in consumer picketing of the Dallas Symphony Orchestra's joint concerts with the Employer and by threatening to induce the Orchestra's employees to cease work. We also agree that the Union, its sister local, and the international did not violate Section 8(b)(4)(i)(ii)(B) by placing the Employer on the international Unfair List.

FACTS

Erin Miel, Inc., d/b/a Wayne Newton ("Employer") provides musical entertainment services. The Employer employs 10 regular musicians. The Employer requires venues to hire six or ten additional musicians to play certain instruments and to perform along with Newton and his regular musicians, but does not select the additional musicians or determine their wages or other terms and conditions of employment.

Musicians Union of Las Vegas, Local 369 ("Las Vegas Local") is the former collective-bargaining representative of the Employer's musician employees. The parties' collective-bargaining agreement expired in 2004, and, in 2006, the Las Vegas Local requested that the American Federation of Musicians ("AFM") place the Employer on its International Unfair List because the Employer did not pay area standard wages and benefits.[1] On January 9, 2007, the Las Vegas Local was decertified. On December 11, 2007, the AFM e-mailed the Employer a draft agreement and suggested that it could be used as a collective-bargaining agreement between the AFM and the Employer for touring purposes. The Las Vegas Local informed the Employer that it would remove the Employer from the Unfair List if the Employer executed a collective-bargaining agreement. The Employer rejected both proposals. The Region has determined that the Las Vegas Local has a primary, area standards labor dispute with the Employer.

The Dallas Symphony Orchestra ("DSO") performs at the Meyerson Symphony Center in Dallas, Texas.[2] The DSO's

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[1] The Unfair List is published in the official journal of the AFM and the AFM website. The AFM website also states that "Members are reminded that, in accordance with...AFM Bylaws, 'Members shall not render musical services for organizations, establishments, or people who have been placed on the International Unfair List. Any member who violates this Section shall be subject to penalties....'"

[2] The Meyerson Center is owned and managed by the City of Dallas. In addition to the DSO, the Dallas Wind Symphony, Greater Dallas Youth Orchestra, and other organizations use the Meyerson Center's concert hall.

musicians are represented by the Dallas-Fort Worth Professional Musicians' Association, Local 72-147 ("Dallas Local").

In February 2008,[3] the DSO entered into an agreement with Newton for three September concerts as part of the DSO's Pops Series.[4] Under the agreement, the DSO would perform for the first 40 minutes, and Newton would not participate in or direct the performance. After an intermission, Newton, his regular musicians, the additional musicians hired by DSO, and the DSO would play as an ensemble. During this part of the performance, Newton would "direct" the performance by calling out the song to be played. The agreement required the Employer to provide the charts for the music to be played during Newton's performances, as well as cover the airfare for Newton, his regular musicians, and his technicians. The DSO would cover the Employer's transportation costs to and from the airport, hotel, and the Meyerson Center.

On March 8, the Dallas Local sent a memorandum to the DSO stating:

> This memorializes our March 6, 2008 discussion concerning [DSO's] engagement of Wayne Newton.... Because of the existence of a primary labor dispute between the [AFM] and Newton, Newton is presently on the AFM's International Unfair List. Consequently, [the Dallas Local] will picket the subject engagements, distribute leaflets to patrons and publicize the nature of the dispute in an effort to persuade the concert going public to refrain from attending the services.

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[3] All dates are in 2008 unless otherwise indicated.

[4] The types of concerts in the DSO's Pops Series vary from joint performances by the DSO and popular musical artists; performances by musical artists without the DSO; and performances of popular themes, such as Disney music, solely by the DSO. Tickets to Pops Series concerts are sold by the DSO on an individual show basis and as subscription packages.

> Further, I have no doubt whatsoever that the talented members of the orchestra will refuse to cross our lawful primary picket line to perform for or with Newton. It is a shame that the reputation and goodwill of the [DSO] should be associated with an entertainer whose name has been placed on the AFM's Unfair List.

In mid-March, the DSO notified the Employer of the Dallas Local's threat to picket and told the Employer to resolve the issue in the next few days. On about April 15, the DSO told Newton's talent agent that it would cancel the concerts if the Unfair List issue was not resolved. The DSO also contacted Newton's road manager and informed her that the situation needed to be resolved in the next few days.

On May 2, the Dallas Local sent an e-mail to the DSO stating:

> This letter is a follow-up to, and replaces, my March 8, 2008 Memorandum to you concerning the September 5 and 6, 2008 Wayne Newton appearance with the DSO. Although in that Memorandum I advised you that [the Dallas Local] would picket the engagements and would distribute leaflets to patrons and publicize the nature of the dispute in an effort to persuade the concert-going public to refrain from attending the performances, we have decided that we will not engage in any picketing activities but will limit our activities to lawful consumer publicity, including distributing leaflets to patrons, designed to inform the public about the facts surrounding the labor dispute with Wayne Newton.
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> Moreover, although there will not be any picket lines at the performance, AFM Bylaws require that its members refrain from working with entities who are on the Federation Unfair List. Because Wayne Newton is on the Federation Unfair List as a consequence of a labor dispute with the [Las Vegas Local], I have no doubt whatsoever that the talented members of the orchestra will refuse to perform for or with Newton.

On May 27, the DSO notified Newton's talent agent that it was withdrawing its offer for the September concerts because it had been unaware that Newton was on the Unfair List when it made the offer. The DSO also stated that it was not pleased that two DSO officials had been subpoenaed by the Board, which had dragged the DSO into a dispute between Newton and the AFM.

As a result of the cancellation, the Employer lost $150,000 in compensation for the performances and a $500 merchandising fee. The Employer was unable to secure a substitute venue for those dates and cannot recoup the loss. The DSO estimated a loss of up to $20,000 and marketing costs of $10,000 to $15,000 to replace Newton with another performer.

ACTION

We agree with the Region that the Dallas Local violated Section 8(b)(4)(ii)(B) by threatening to engage in consumer picketing of the DSO/Employer concerts because such picketing would unlawfully enmesh the DSO in the Dallas Local's dispute with the Employer. The Dallas Local further violated Section 8(b)(4)(ii)(B) by threatening to induce the DSO's employees to cease work. Finally, we agree that neither the Dallas Local, the Las Vegas Local, nor the AFM violated Section 8(b)(4)(i)(ii)(B) by placing Newton on the Unfair List.

A. The Dallas Local violated Section 8(b)(4)(ii)(B) by threatening to picket the DSO/Employer concerts.

Despite its language, Section 8(b)(4)(ii)(B) does not necessarily prohibit picketing to persuade customers of a neutral employer not to buy the products or services of a primary employer. In Tree Fruits,[5] for example, the Supreme Court held that a union striking certain Washington fruit packers lawfully picketed large supermarkets in order to persuade customers not to buy the fruit packers' apples. The Court noted that the apples were but one item among many that made up the retailer's trade; if the union

[5] NLRB v. Fruit Packers, Local 760 (Tree Fruits), 377 U.S. 58, 72 (1964).

activity was successful, it simply would have induced the neutral retailer to reduce its orders for the product or to drop the item as a poor seller.[6] The marginal injury to the neutral retailer would be purely incidental to the lawful primary product boycott, and the neutral would have little reason to become involved in the labor dispute.[7]

By contrast, when consumer picketing is employed to persuade customers of a neutral employer not to trade at all with the secondary employer, the latter stops buying the struck product not because of a falling demand, but in response to pressure designed to inflict injury on the secondary business generally. In such cases, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[8] Thus, the Board routinely finds that a union violates Section 8(b)(4)(ii)(B) when it pickets in front of a neutral employer's facility with signs that fail to clearly identify the product to boycott and the primary employer with whom the union has its labor dispute.[9]

Under the "merged product" doctrine, even consumer product picketing that clearly identifies the struck product and the primary employer will be found to violate Section 8(b)(4)(ii)(B) if the primary goods or services have become so merged into the output of the secondary employer being picketed that the "only way for a customer to boycott the struck product is to cease patronizing the

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[6] Id. at 73.

[7] NLRB v. Retail Store Employees Local 1001 (Safeco), 447 U.S. 607, 613 (1980), discussing Tree Fruits.

[8] Tree Fruits, 377 U.S. at 72.

[9] See, e.g., Meat & Allied Food Workers Local 248 (Milwaukee Independent Meat Packers Assn.), 230 NLRB 189, 189 n.3 (1977), enfd. mem. 571 F.2d 587 (7th Cir. 1978); San Francisco Typographical Union No. 21 (California Newspapers, Inc.), 188 NLRB 673, 680 (1971), enfd. 465 F.2d 53 (9th Cir. 1972).

picketed place of business."[10] In other words, in merged product situations, picketing that attempts to follow the primary's product inevitably encourages a boycott of the neutral party.[11] For example, in Teamsters Local 327 (American Bread Company),[12] a union with a primary labor dispute against a bread company unlawfully picketed two restaurants asking customers not to use the bread company's products, which were in the restaurants' sandwiches and other products. In enforcing the Board's order, the Sixth Circuit noted that the bread company's output was integrated into the restaurant's meals and could not readily be recognized by the customers as to particular brand; in order for restaurant customers to express sympathy for the union, they would have had to refrain from ordering any meals served with bread or bakery products. Thus, the union's picketing of the restaurants entailed practically a boycott on all meals served in the secondary establishment.[13]

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[10] Cement Masons Local 337 (California Assn. of Employers), 190 NLRB 261, 266 (1971), enfd. 468 F.2d 1187 (9th Cir. 1972), cert. denied 411 U.S. 986 (1973).

[11] Safeco, 447 U.S. at 613 n.7. See also Operating Engineers Local 139 (Oak Construction), 226 NLRB 759, 759 (1976) (merged product picketing "necessarily extends beyond the struck products or services and spreads to and embraces all aspects of the secondary employer's business").

[12] 170 NLRB 91 (1968), enfd. 411 F.2d 147 (6th Cir. 1969).

[13] 411 F.2d at 154. See also Operating Engineers Local 139 (Oak Construction), 226 NLRB at 759 (union embroiled in primary dispute with company constructing manholes and underground telephone conduits for telephone company unlawfully picketed telephone company's offices, because end product of primary's services formed integral part of telephone company's total system). Cf. UNITE, Cases 5-CC-1278, et al., Advice Memorandum dated April 1, 2004 (union embroiled in primary dispute with laundry company lawfully picketed hotel urging guests not to use primary's dry cleaning service, which was marginal aspect of hotel's business, rendering merged product doctrine inapplicable; noting, however, that picketing would have been unlawful

Here, the Wayne Newton/DSO concert was to be a "merged product" in that the Employer's product – its musical performance – would be completely integrated into the joint concert put on by neutral DSO.[14] Thus, customers who wished to attend the concert could not have separated the Employer's performance from that of the DSO. In order to honor the threatened picket line, customers would have had little choice but to boycott the DSO as well as the Employer.[15] Under these circumstances, even though the March 8 letter advised the DSO that the picketing would be "lawful" and would publicize the primary dispute with the Employer, the Dallas Local's object was to pressure the DSO

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had it targeted primary's laundry service, because that would have involved a consumer boycott of items such as sheets and towels that were essential to the hotel's basic operation).

[14] We agree with the Region that the DSO should be treated as a neutral, unlike an earlier case involving the Employer where the Division of Advice found that a union could lawfully induce employees of a secondary booking agent not to perform in a show with the Employer because the sole function of the booking agent was to supply musicians to be employed by the Employer. Compare American Federation of Musicians of the United States and Canada, American Federation of Musicians Local 433, and Musicians Union of Las Vegas Local 369, Case 28-CC-1009, Advice Memorandum dated August 7, 2006. Here, although the DSO would be required to hire additional musicians to perform with the Employer, they would be employed by the DSO at all times, and their performance would be as part of an ensemble with both the Employer and the DSO.

[15] Operating Engineers Local 139 (Oak Construction), 226 NLRB at 759 (in merged product cases, the "economic realities of the dispute make it impossible for consumers to cease purchasing the primary products or services without ceasing to buy nonstruck products or services as well").

to resolve the dispute.[16] Accordingly, the Dallas Local's March 8 letter was an unlawful threat to picket.[17]

B. The Dallas Local violated Section 8(b)(4)(ii)(B) by threatening to induce DSO employees to cease work.

A union violates Section 8(b)(4)(ii)(B) by threatening to commit a violation of Section 8(b)(4)(i)(B), which prohibits a union from inducing or encouraging a neutral's employees from ceasing work for their employer. Unlawful inducement or encouragement has been found when a union makes a statement directly to neutral employees that would "reasonably be understood as a signal or request to cease

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[16] Compare Amalgamated Packinghouse Workers (Packerland Packing Co.), 218 NLRB 853, 854 (1975), where a union's threat to picket secondary retail stores that sold a secondary sausage producer's products containing the primary's product (beef) was found to be lawful even though the union had conceded that the primary's product had merged with that of the neutral sausage producer. The union had offered the Board examples of how it could have engaged in lawful informational picketing under the circumstances, and the Board concluded that "[w]ithout delving into the various forms the legend on the picket signs may have taken had picketing occurred, it is sufficient to find that lawful picketing could have been conducted in the circumstances herein...." Ibid. Unlike in Packerland, the Dallas Local has not suggested any scenario under which the threatened picketing could be conducted lawfully against the merged concert, and we cannot posit any.

[17] See Teamsters Local 126 (Ready Mixed Concrete, Inc.), 200 NLRB 253, 253 n.2 (1972) ("a threat to an employer to picket is itself coercive, whether or not the picketing is subsequently instituted...."). The Dallas Local's May 2 e-mail, which disavows any intention to picket, did not cure the March 8 violation. See Teamsters Local 705 (Johns-Manville Products), 205 NLRB 387, 392 (1973), enfd. per curiam 509 F.2d 425 (D.C. Cir. 1974) (union's letter to neutral employer purporting to retract unlawful threat to picket contained in prior letter did not moot the controversy).

work for their own employer."[18] Threats to engage in such conduct violate Section 8(b)(4)(ii)(B) if the "natural and foreseeable consequences" are to force the secondary employer to cease doing business with the primary employer in order to pressure the primary employer and aid the union in its dispute.[19]

The Dallas Local violated Section 8(b)(4)(ii)(B) by threatening, in its May 2 e-mail, to "induce or encourage" the DSO's employees within the meaning of Section 8(b)(4)(i)(B). While the first paragraph of the e-mail stated that the Dallas Local would engage in informational handbilling directed at consumers, the second paragraph in effect threatened to directly appeal to DSO employees to cease work. Thus, the second paragraph's explicit reference to the Bylaw prohibition on working with entities on the Unfair List, punctuated by the statement that there was "no doubt whatsoever" that the DSO employees would not report to work, intimated that the Dallas Local would give similar prominence to the Bylaws and the unfair listing in its discussions with DSO employees.[20] Additionally, it is clear that the work stoppage threatened in the e-mail would

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[18] Los Angeles Bldg. & Constr. Trades Council (Sierra South), 215 NLRB 288, 290 (1974).

[19] Building & Constr. Trades Council of Los Angeles (Kon Lee Building Co.), 162 NLRB 605, 609 (1967).

[20] See Painters Local 48 (Hamilton Materials), 144 NLRB 1523, 1524 (1963), enfd. 340 F.2d 107 (9th Cir. 1965), cert. denied 381 U.S. 914 (1965) (telling neutral employees that primary employer is "unfair" constitutes inducement and encouragement under Section 8(b)(4)(i)(B), distinguishing lawful, primary appeals to the public at large); Carpenters Local 98 (Kimsey Mfg. Co.), 89 NLRB 1168, 1171-72 (1950) (telling neutral employees that primary was on "unfair list" calculated to induce and encourage employees to engage in work stoppage); Los Angeles Bldg. & Constr. Trades Council (Sierra South), 215 NLRB at 290 (telling neutral employees that "picketing was authorized and sanctioned" in response to questions as to whether they should work for their employer during picketing was unlawful inducement).

halt work not only for the Employer but also for the DSO.[21] The foreseeable consequence of the May 2 e-mail was for the DSO to cease doing business with the Employer.[22] Thus, the e-mail violated Section 8(b)(4)(ii)(B).[23]

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[21] Thus, the agreement between the DSO and the Employer required that the DSO perform during the entire concert; by itself for the first 40 minutes and as part of an ensemble with the Employer and the additional musicians hired by the DSO for the remainder of the show. See Drivers, Warehouse & Dairy Employees Local 75 (Seymour Transfer), 176 NLRB 530, 534 (1969) (assuming that primary's trucks and trailers, wherever found, constituted the situs of the primary dispute, union's appeals to neutral employees to refrain from working for their employers, to sit down at or leave their employers during picketing, and to not cross the picket line, were unlawful requests to refrain from all work for their employers while picketing was in progress, not mere requests to refuse to load and unload the primary's trucks).

[22] Cf. Mine Workers (New Beckley Mining), 304 NLRB 71, 73 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (union's intent is measured "as much by the necessary and foreseeable consequences of its conduct as by its stated objective"). Indeed, the DSO canceled the concerts a few weeks after receiving the e-mail.

[23] Building & Constr. Trades Council of Los Angeles (Kon Lee Building Co.), 162 NLRB at 609 (union violated Section 8(b)(4)(ii)(B) by threatening neutral that his employees were liable for a $200 fine because they crossed picket line); Ironworkers Local 433 (United Steel), 280 NLRB 1325, 1330-1331 (1986) (union violated 8(b)(4)(ii)(B) when it threatened primary that neutral's employees would be fined $500 and blacklisted if they worked on the job with the primary's employees), enf. denied 850 F.2d 551 (9th Cir. 1988); Meat Cutters Local 227 (Iowa Beef Packers), 185 NLRB 858, 861 (1970) (union violated Section 8(b)(4)(ii)(B) by telling neutral beef distributor that the primary's beef "will not be handled by our people" and that the union would ask its members not to handle the beef).

We reject the Dallas Local's contention that it simply advised the DSO of the unfair listing and predicted, based on individual conversations with DSO employees, that they would probably honor their obligation as union members not to perform with someone on the Unfair List. The e-mail was not a simple prediction but, rather, it referenced the AFM Bylaws' prohibition on working with entities on the Unfair List and stated that the Dallas Local had "no doubt whatsoever" that DSO employees would not report to work.[24] Moreover, because the e-mail threatened a work stoppage against the DSO, this case is not akin to decisions finding "the mere giving of notice of prospective strike action against a subcontractor to the prime contractor" to be lawful.[25]

C. Placing the Employer on the Unfair List was not unlawful.

We agree with the Region that the Dallas Local, the Las Vegas Local, and the AFM did not violate Section 8(b)(4)(i)(ii)(B) by placing the Employer on the unfair list. The Region has concluded that the Las Vegas Local and the Employer have a primary, area standards labor dispute. It is well established that placing a primary employer on a union unfair list does not violate Section 8(b)(4); rather, the Board views an unfair listing as a

[24] Even if the e-mail could be interpreted as a "prediction," such predictions have been found to be unlawful. See Sheet Metal Workers Local 2 (Hall Refrigeration), 203 NLRB 954, 955-56 (1973) (telling neutral that it was "afraid" that its members would "walk off the job" if members of other union, with which it had jurisdictional dispute, were not removed, unlawful; union could not "exculpate itself by putting the blame on its members"); Teamsters Local 705 (Johns-Manville Products), 205 NLRB at 391 (telling neutral that its "own employees would be very confused as to whether or not to cross the picket line and come to work themselves," unlawful).

[25] Cf. Teamsters Local 83 (Marshall & Haas), 133 NLRB 1144, 1146 (1961).

direct attack on the primary employer that is aimed at the public at large.[26]

Accordingly, the Region should issue a Section 8(b)(4)(ii)(B) complaint, absent settlement, consistent with the foregoing.

B.J.K.

[26] Painters Local 48 (Hamilton Materials), 144 NLRB at 1524. See also Denver Bldg. & Constr. Trades Council (Grauman Co.), 87 NLRB 755, 756-57 (1949) (merely placing primary employer's name on unfair list does not constitute unlawful inducement or encouragement of secondary employees to cease work; "[p]ublication of...the existence of a primary dispute by means of the unfair list invites secondary action no more than does primary picketing"); Electrical Workers Local 73 (Northwestern Construction), 134 NLRB 498, 500-501 & n.9 (1961) (distribution of an unfair list, like handbilling, is a "form of publicity other than picketing" that serves to advise the public, including consumers and members of a labor organization, of the existence of a labor dispute).