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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

RELEASE

TO : Peter W. Hirsch, Director
Region 4

DATE: NOV 29 1985

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Giant Food Stores, Inc./
Easton Development Co.
Case 4-CA-15117

220-2550-4500
512-5009
512-5072-3900
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This Section 8(a)(1) case was submitted for Advice on the issues of: whether the Union's area standards handbilling and picketing in front of Giant's store on its private property was protected; whether Giant violated the Act when the local police asked the pickets to leave and threatened them with arrest if they failed to do so; and whether Giant's and EDC's filing of a state lawsuit for an injunction to prohibit the Union from engaging in area standards picketing on their premises violated the Act.

FACTS

Giant Food Stores, Inc. (Giant) operates a chain of grocery stores, including a new store located in a shopping center still under construction in Easton, Pennsylvania. None of the other stores located in the shopping center have yet opened. The shopping center is owned by the Easton Development Co. (EDC); however Giant has exclusive use of its store building and the sidewalk immediately adjacent thereto. The parking lots, loading zones, roadways and traffic islands are common areas controlled by EDC. There are two entrances to the shopping center parking lot from public streets, one from William Penn Highway and the other from Greenwood Avenue. The William Penn Highway entrance appears to be the most widely used by customers and, according to local police, carries approximately 40,000 vehicles per day.

On May 6, 1985, 1/ Giant met with the town police to discuss the upcoming store opening and prepare for the possibility of union pickets. At the meeting, Giant generally explained its past experience with area standards picketing, and told the police that it might call on them in the event pickets appeared at the store, but that it did not want pickets arrested. Giant opened the Easton store on May 14. At each entrance to the store Giant posted a sign which states that unauthorized solicitation on company premises is prohibited. 2/ On May 15, 16, and 24, and on a daily basis thereafter,

1/ All dates hereafter are in 1985.
2/ We have not determined whether this no-solicitation rule is facially invalid, or has been applied in an unlawful manner since the Region has not submitted these issues for advice.

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United Food and Commercial Workers International Association, Local 1357 (the Union) has engaged in area standards picketing and handbilling in front of Giant's store. 3/ On most days the picketing has been limited to several hours per day. In general, there have been two pickets at each of the two store entrances, and two pickets at the William Penn Highway parking lot entrance, for a total of six pickets at any one time. The pickets located at the store entrances have carried signs, distributed detailed handbills, and engaged customers in discussion concerning the nature of the Union's dispute. The pickets located at the lot entrance have only carried signs; they have not attempted to handbill or speak with customers. Consequently, the picketing has had no effect on traffic safety. However, the chief of police believes that should the Union attempt to handbill at the lot entrance, serious traffic safety problems would result. All picketing has so far been conducted in an entirely peaceful manner. There has been no violence, threats of violence, destruction of property or blocking of ingress or egress to Giant's Store.

On May 16, in response to the pickets' presence at the store, Giant phoned the town police. According to the police telephone log, Giant stated that it "[did] not want [the pickets] outside the store". A police car responded to the call, but the pickets had left prior to the time the car arrived. Giant then agreed with the police that Giant would call again in the event the pickets returned.

On May 24, when pickets reappeared at the store, Giant store supervisor Robert Motter called the police. A police officer then arrived at the store, where he told the pickets that Giant had complained of their trespassing on private property and further asked them to leave the store front or be subject to arrest. The pickets complied with the officer's request, and no arrests were made. Although Motter was not present when the police officer confronted the pickets, he was immediately told of the officer's action. Thereafter, Giant made no attempt to commmunicate with the pickets, either directly or through the police.

Later that day, police chief DeVietro called Giant field representative Diehl and stated, "I took care of your problem". Diehl responded that Motter had already so informed him. In addition, DeVietro asked Diehl to provide the police with a written complaint authorizing the arrest of any pickets who resumed picketing on the store property. After conferring with Giant's Attorney, Diehl refused DeVietro's request, stating that Giant did not want the pickets arrested.

Meanwhile, on May 20, Giant and EDC filed a Complaint for Injunction against the Union in state court. The complaint alleged that the Union's pickets unlawfully trespassed on Giant's and EDC's private property, and that the injunction should be granted to stop the Union from engaging in mass picketing and other coercive and intimidating conduct.

3/ There is no dispute concerning the object of the Union's activity.

On June 10, the Union filed the instant charge, alleging that Giant and EDC violated Section 8(a)(1) and (3) by filing a lawsuit seeking to enjoin the Union from picketing on their property. The Union amended the charge on June 14 to further allege that EDC and Giant unlawfully requested the pickets to leave their property and threatened the pickets with arrest.

On July 1, the state court dismissed the complaint filed by EDC and Giant, for lack of jurisdiction. The court found that since the Union had filed an unfair labor practice charge with the Board, the court was preempted from considering the state law claim. The court also concluded that since there was no evidence that the Union engaged in mass picketing, violence or coercive behavior, intervention in the interest of public health and welfare was unwarranted.

ACTION

We have concluded that the Union's right to engage in protected area standards picketing and handbilling outweighs Giant's private property rights in the circumstances of this case. Further, we find that Giant violated Section 8(a)(1) of the Act in that the police acted as its agent in demanding that the pickets leave Giant's premises or be arrested, thereby interferring with the Union's protected activity. Finally, we have concluded that Giant and EDC violated Section 8(a)(1) of the Act by filing a lawsuit in state court to enjoin the Union from engaging in area standards picketing on Giant's and EDC's premises.

The Board has held that area standards picketing constitutes activity which is affirmatively protected by Section 7 of the Act. 4/ However, where such activity is engaged in on private property, the Supreme Court has instructed the Board to balance the competing Section 7 rights of the union and the private property rights of the employer, and accommodate each "with as little destruction of one as is consistent with the maintenance of the other." 5/

In our view, the Board decisions issued to date "balance" the Section 7 rights and property rights in such a manner as to make it at least arguable that there is a violation in the instant case. These decisions are discussed infra. However, as also discussed infra, there is a reasonable concern that the Board decisions have not been in accord with the views of the Supreme Court. Accordingly, while the Region should argue for a violation herein under extant Board law, it should expressly set forth, in any brief, the view that extant Board law may be inconsistent with the teachings of the Supreme Court.

4/ Giant Food Markets, Inc., 241 NLRB 727, 728 (1979), enf. denied 633 F.2d 18 (6th Cir. 1980).

5/ NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); Giant Food Markets, Inc., 241 NLRB at 728.

In Giant Food, the Board applied this balancing test in a situation where the picketed store shared its premises with another neutral store, and the employer demanded that the pickets move from the store front to the parking lot entrance. The Board concluded in Giant Food that the union's Section 7 rights outweighed the employer's property rights after considering the following factors: the picketed employer was the employer with which the union had its dispute; the union's intended audience consisted primarily of potential customers, identifiable only upon their entry to the store; picketing at the lot entrance posed a risk of enmeshing neutrals in the dispute; the union's message would be diluted if picketing were limited to the lot entrance, due to motorists' concern for traffic safety and their consequent reluctance to stop to receive a handbill or to speak with pickets; the pickets had not engaged in any violence or interfered with ingress or egress to the store; and the employer's store was generally held open to the public, thereby minimizing the degree of intrusion on the employer's property rights caused by the pickets' presence. 6/ Further, the employer's demand in Giant Food, that the pickets remove themselves from its property, was found to constitute sufficient interference with the union's exercise of its protected rights to warrant finding that the employer had violated Section 8(a)(1). 7/

Similarly, in Montgomery Ward & Co., Inc., 8/ the Board held that a union had the right to engage in consumer boycott handbilling on the employer's single-store premises in the absence of effective alternative means of reaching the store's customers. In that case, the Board found that the employer had violated Secton 8(a)(1) by requiring that the union handbill "from the curb, driveway entrances or anywhere else not on store property". As noted by then Chairman Van De Water in his concurring opinion, few potential customers were willing to stop their cars and roll down their windows in order to receive the union's message, and those few who did created a traffic hazard. As use of mass media was not a reasonable alternative, there remained no viable means by which the union could communicate with potential customers. 9/

Applying these principles to the instant case, we conclude that the Union's right to picket and handbill on Giant's premises outweighs Giant's private property rights. First, as in Giant Food, the picketed employer herein is the employer with which the union has its dispute. Second, as in Giant Food and Montgomery Ward, the Union's intended audience in the instant case consists of potential customers who become readily identifiable only upon entering Giant's parking lot. Third, although in Giant Food there was one other employer on the premises and a consequent danger of enmeshing a neutral employer in the primary dispute if the picketing were restricted to the parking lot entrance, we note that in Montgomery Ward, as in the instant case, the employer was the sole occupant of the premises, and the Board nevertheless found that the union's rights outweighed those of the employer. Fourth, as noted by Chief of Police DeVietro, limiting the picketing herein to the lot

6/ Giant Food Markets, Inc., 241 NLRB at 728-729.
7/ Id. at 729.
8/ 265 NLRB 60 (1982).
9/ Id. at 61 (Van De Water concurring).

entrance would pose a traffic safety hazard and would thus be likely to cause customers entering the lot to refuse the pickets' handbills and attempts to engage in conversation. 10/ And, since the handbills and any discussions would convey a more detailed message than the picket signs, requiring the Union to limit its activity to mere picketing only at the lot entrance would severely dilute its message. Futhermore, the pickets' conduct herein, at the store entrances, has not created a nuisance. The number of pickets' at each store entrance has been limited to two, and there have been no incidents of violence or blocking of ingress or egress to Giant's store. Finally, as in Giant Food, since Giant's store is generally held open to the public, there is a minimal degree of intrusion on its private property rights as a result of the Union's peaceful picketing.

For the reasons discussed supra, the Region should argue that under extant Board law, the Board should balance the competing rights herein in favor of the Section 7 right. The counter-argument is that the Supreme Court has clearly indicated that the Babcock balance may not apply at all to "area standards" activity directed to customers, as distinguished from organizational activity directed to employees. As the Court said in Sears Roebuck v. Carpenters, 98 LRRM 2283, 2292, there is a "serious question" as to whether "area standards" activity is entitled to the same "deference" as organizational activity, in terms of whether to permit such activity to occur on private property. The Court explained:

> Indeed, several factors make the argument for protection of trespassory area standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation. First, the right to organize is at the very core of the purpose for which the NLRB was enacted. Area standards picketing, in contrast, has only recently been recognized as a Section 7 right. Hod Carriers Local 41 (Calumet Contractors Assn.), 133 NLRB 512, 48 LRRM 1667. Second, Babcock makes clear that the interests being protected by according limited access rights to nonemployee union organizers are not those of the organizers but of the employees located on the employer's property. The Court indicated that 'no . . . obligation is owed nonemployee organizers'; any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively. Area

10/ It appears from both Giant Food and Montgomery Ward that a union's right to picket carries with it a right to communicate more directly and in more detail by handbills and conversation.

> standards picketing, on the other hand, has no such vital link to the employees located on the employer's property. While such picketing may have a beneficial effect on the compensation of those employees, the rationale for protecting area standards picketing is that a union has a legitimate interest in protecting the wage standards of its members who are employed by competitors of the picketed employer.

Thus, it may be that the "balancing" test does not even apply to area standards activity. Further, even if it does apply, it would appear that the balance is to be struck far differently for area standards activity than for organizational activity. That is, area standards activity would be allowed only upon a substantial showing that non-trespassory area standards activity would be wholly ineffective. In the instant case, there is no substantial showing that non-trespassory conduct such as pickets at the entrance to the parking lot or mass media appeals, etc. would be wholly ineffective in alerting the public to the "substandard" conditions of the Employer.

In addition, as in Giant Food and Montgomery Ward, we find that the demand herein that the pickets leave Giant's premises or be subject to arrest interfered with the Union's Section 7 rights. Although the demand was made by a police officer rather than Giant, we find that the police officer acted as Giant's agent and that Giant therefore violated Section 8(a)(1) of the Act 11/. Thus, we would argue that Giant expressly authorized the police to move the pickets off Giant's premises when, in response to the pickets' presence on May 16, it called the police and stated that it did not want the pickets outside the store. Although the pickets had left the store premises before the police arrived on that date, Giant agreed to again notify the police in the event the pickets reappeared. Hence, when the police officer responded to Giant's May 24 call regarding the presence of pickets on its premises and, upon arriving at the store, demanded that the pickets move to the lot entrance or be subject to arrest, the police officer acted on the express authority of Giant. 12/

11/ Since EDC took no part in contacting the police and since it appears that Giant acted only on its own behalf in so doing, that portion of the charge which alleges that EDC violated the Act by requesting that the pickets move to the parking lot entrance should be dismissed, absent withdrawal.

12/ See e.g., International Longshoremen's and Warehousemen's Union (Sunset Line and Twine Co.) 79 NLRB 1487, 1507-1508 (1948). Giant's May 6 statement to the police that it did not want the pickets arrested was not deemed to negate the view that the police acted with Giant's express authorization when they responded to Giant's May 24 call and threatened the pickets with arrest if they did not leave the premises, since Giant responded to the pickets' presence on May 16 by calling the police and stating that it did not want the pickets outside its store. Moreover, Giant's claim on may 24, after the police had acted, that it wanted no arrests, also does not negate such authorization since Giant took no action to dissociate itself from the conduct engaged in by the police even though it was promptly informed of the action the police had taken.

We would also argue in the alternative that the police officer's conduct is attributable to Giant since the officer had apparent authority to act on Giant's behalf, and since Giant knew of the officer's actions and failed to disavow them. The Board has found that an agency relationship is established under a theory of apparent authority where, under all the circumstances, a third party would reasonably believe that the purported agent's actions are a reflection of the principal's policies and that the purported agent is acting on behalf of the principal. 13/ The Board has also held that where a principal has been advised that an outsider has been acting as its agent although actually unauthorized to do so, and where the principal then fails to disavow such agency, the principal is considered to have affirmed the agency relationship and to have ratified the act of the purported agent. 14/

In the instant case, the Union certainly became aware of Giant's hostility toward its picketing by the time Giant and EDC filed their lawsuit on May 20. Therefore, on May 24, when the police officer appeared on Giant's premises and, after stating that Giant had complained of the pickets' activites, demanded that the pickets move to the perimeter of the parking lot or be subject to arrest, the pickets could reasonably be expected to believe that the police officer acted on Giant's behalf. Furthermore, Giant was aware of the officer's action within minutes of its occurrence and made no effort to reverse his action ro dissociate itself from the action. In such circumstances, we would argue that Giant's failure to disavow the police officer's apparent authority to act on its behalf constitutes ratification of the officer's action.

Therefore, since we have concluded that the Union's Section 7 rights to engage in area standards picketing and handbilling on Giant's premises outweigh Giant's property rights, and since we have concluded that the police officers' demand that the pickets leave Giant's store-front and the officer's threat of arrest constituted interference with the Union's Section 7 rights attributable to Giant, Giant has violated Section 8(a)(1) of the Act.

Finally, we have also concluded that Giant and EDC violated Section 8(a)(1) by maintaining a civil trespass suit against the Union in a state court. In Bill Johnson's Restaurant, Inc. v. NLRB, 15/ the Supreme Court held that although an employer's lawsuit filed in retaliation for the exercise of Section 7 rights violates Section 8(a)(1), the Board may not enjoin a pending suit where the state court has jurisdiction and the suit has a reasonable basis in fact and law. However, where the employer's lawsuit is preempted and the state court thereby has no jurisdiction to consider it, Bill Johnson's does not

13/ Community Cash Stores, 238 NLRB 265, 266 (1978), enf'd per curiam 87 CCH LC ¶ 11,593 (4th Cir.1979).

14/ Dean Industries, Inc. 162 NLRB 1078, 1093 n. 44 (1967).

15/ 461 U.S. 731, 113 LRRM 2647 (1983).

preclude the Board from proceeding against the employer for its violation of Section 8(a)(1). 16/ In the instant case, the state court found, and we agree, that EDC's and Giant's lawsuit was preempted. 17/ As found by the state court, there is no factual support for EDC's and Giant's allegations that the Union engaged in mass picketing or the coercion and intimidation of customers. Therefore, there is no "compelling state interest" which would militate against preemption. 18/ Accordingly, once the Union filed its charge on June 10, the state court suit was preempted. 19/ Since the state court had no jurisdiction after that date, and since the Union's Section 7 activity was the "but for" cause of the suit, it is clear that the maintenance of the suit after June 10 was unlawful. 20/ Thus, EDC and Giant violated Section 8(a)(1) of the Act. 21/

In the event that Giant withdraws its state court proceeding upon notification of this determination, further proceedings would not be warranted on this aspect of the case. Concededly, there would be no cease and desist order and no notice posting as to the maintenance of the lawsuit. However, the actual cessation of the lawsuit, coupled with the cease and desist order and notice posting to be secured as a remedy for the other aspect of the case, would be a sufficient effectuation of the remedial polices of the Act.

H.J.D.

16/ Bill Johnson's Restaurant v. NLRB, 113 LRRM at 2650 n. 5, 2653. See also Smith's Management Corporation d/b/a Smith's Food King and Smith's Food Drug, Case 31-CA-13359, Advice Memorandum dated January 24, 1984.

17/ If a higher court should reverse the holding of preemption, the Region should immediately notify Advice.

18/ San Diego Building Trades Council v. Garmon, 359 U.S. at 247-248, n. 6.

19/ Sears v. Carpenters, 436 U.S. 180, 98 LRRM 2282, 2293 (concurring opinion of Justice Blackmun).

20/ Arguably, the suit was lawful from May 20 (when it ws filed) until June 10. However, this would not privilege its maintenance after June 10.

21/ Although the maintenance of the suit violated Section 8(a)(1), it cannot constitute "discrimination in regard to hire or tenure of employment or any term or condition of employment" of employees, and therefore the suit cannot violate Section 8(a)(3). Accordingly, and also in view of the fact that a full remedy for filing such a suit can be obtained by establishing a violation of Section 8(a)(1), the Section 8(a)(3) allegation in the instant charge should be dismissed, absent withdrawal.