

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

Advice Memorandum

DATE: March 2, 2016

TO: John J. Walsh, Regional Director
Region 1

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

SUBJECT: United Food and Commercial Workers, Local 8(g) Chron
1445 (GGNSC Gloucester LLC d/b/a Golden 593-2025-2000-0000
Living Center- Gloucester)
Case 01-CG-164974

The Region submitted this case for advice as to whether the Union violated Section 8(g) of the Act when it demonstrated on a public sidewalk approximately 100 feet from the entrance to the Employer's facility without providing ten days' advance notice of that activity to the Employer and the Federal Mediation and Conciliation Service ("FMCS"). We conclude that the Union's conduct was not picketing and, therefore, the Union was not required to give Section 8(g) notice. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

GGNSC Gloucester LLC d/b/a Golden Living Center-Gloucester ("the Employer") is a nursing facility in Gloucester, Massachusetts. United Food and Commercial Workers Local 1445 ("the Union") has represented the Employer's service and maintenance employees since 1986. The parties' most recent collective-bargaining agreement expired on November 8, 2015.

On October 26, 2015, two weeks before the contract expired, approximately 12 Union representatives and off-duty employees held a demonstration on a public sidewalk outside of the Employer's facility. There is no entrance to the facility from the public sidewalk where the demonstration took place. Rather, the public sidewalk area is approximately 100 feet from the facility entrance on a street perpendicular to the street facing the Employer's property. The Union supporters held signs with the following messages: "Standing for Respect," "Standing Strong," "United we will not be defeated," "The union difference," "Honk if you support weekly paychecks," and "NO Contract NO Peace." There is no evidence that any of the demonstrators patrolled or blocked ingress or egress. The demonstrators remained on the sidewalk holding signs for approximately two hours.

The Union did not give ten days' notice pursuant to Section 8(g) before engaging in the demonstration. The Employer filed the current charge alleging that the Union violated the Act by failing to do so.

ACTION

We conclude that the Union's conduct was not picketing and, therefore, the Union was not required to give Section 8(g) notice to the Employer and FMCS. Accordingly, the Region should dismiss the charge, absent withdrawal.

Section 8(g) requires unions to give ten days' notice to a targeted health care institution and FMCS prior to "engaging in any strike, picketing, or other concerted refusal to work" at that institution. The Board has held that Section 8(g) requires notice for all forms of picketing, not just those that involve a work stoppage or other disruption of delivery of health services.¹ Thus, a union that engages in informational picketing of a health care institution must give notice under Section 8(g).²

The Board has long held that one 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."³ In *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, the Board described the core conduct of picketing as the "combination of carrying of picket signs and persistent patrolling of the pickets back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite."⁴ In *Eliason*, the Board held that the peaceful display of a large, stationary banner by up to four union supporters on a public sidewalk that did not interfere with persons seeking to enter or exit from the targeted secondary employers was not sufficiently confrontational to constitute picketing.⁵ The Board explained that the

¹ *District 1199, National Union of Hospital and Health Care Employees (United Hospitals of Newark)*, 232 NLRB 443, 443 (1977), *enforced mem.*, 582 F.2d 1275 (3d Cir. 1978).

² *Id.* at 443, 445; *Service Employees Local 535 (Kaiser Foundation)*, 313 NLRB 1201, 1201-02 (1994).

³ *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).

⁴ 355 NLRB 797, 802 (2010) (involving allegations that the respondent union had engaged in secondary boycotts violating Section 8(b)(4)(B)).

⁵ *Id.* at 801-06.

banner displays did not create a confrontation because: (1) “the union representatives held the banners stationary, without any form of patrolling,” and they did not “hold the banner in front of any entrance to a secondary site in a manner such that anyone entering the site had to pass between the union representatives”; (2) “[t]he banners were located at a sufficient distance from the entrance so that anyone wishing to enter or exit the sites could . . . do so without confronting the banner holders”; (3) the union did not “post[]’ the individuals holding the banners at the ‘approach’ to the business “in a manner that could have been perceived as threatening to those entering the site”; and, (4) the banner holders did not keep “any form of list of employees or others entering the site or even interact[] with passersby, other than to offer a handbill.”⁶ In short, persons approaching the targeted facilities could simply ignore the union supporters and their banners.

Moreover, the Board in *Eliason* specifically rejected a broad definition of picketing that would have included any activity where “a union posts individuals at or near the entrance of a place of business for the purpose of influencing customers, suppliers, and employees to support the union’s position in a labor dispute.”⁷ The Board noted that such a broad definition would be inconsistent with Supreme Court case law and the doctrine of constitutional avoidance because it would not permit union supporters to engage in peaceful consumer handbilling near a business, which is non-coercive expressive activity that cannot be prohibited without interfering with First Amendment rights.⁸ The Board also noted that while some of its earlier decisions had used such a broader definition of picketing, the nontraditional conduct alleged to constitute picketing in those cases had been preceded or accompanied by traditional, ambulatory picketing that violated the Act. As a result, persons approaching the targeted facilities in those cases would have construed the nontraditional conduct as a continuation of the unlawful picketing.⁹

⁶ *Id.* at 802-03. See also *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB 1330, 1330-31 (2010) (union’s stationing of banners with two or three holders less than 15 feet from entrances of neutral employers was not picketing); *Southwest Regional Council of Carpenters (Richie’s Installations)*, 355 NLRB 1445, 1445-46 (2010) (conduct was not picketing notwithstanding that the union occasionally moved the banners to comply with orders from police or to stay out of the sun, as the movement was “de minimis”).

⁷ *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB at 803.

⁸ *Id.* at 803-04, 807-11, citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 575-78 (1988) (holding that Section 8(b)(4)(ii)(B) does not prohibit peaceful handbilling urging a consumer boycott of secondary employers).

⁹ *Id.* at 803-04.

In *Sheet Metal Workers Local 15 (Brandon Medical Center)*,¹⁰ the Board applied *Eliason* and concluded that a union's demonstration in front of a hospital was not picketing. In *Brandon Medical Center*, seven union members set up a sixteen-foot-tall inflatable rat displaying a banner approximately 100 feet from the hospital entrance and distributed leaflets nearby.¹¹ In addition, one union representative held a leaflet in front of his chest as a placard directed at motorists entering the employer's facility.¹² The Board stated that the rat and leaflet displays, "like the banner displays in *Eliason*, entailed no element of confrontation, as they were stationary and located at sufficient distances from the vehicle and building entrances to the hospitals that visitors were not confronted by any actual or symbolic barrier as they arrived at, or departed from, the hospital."¹³ The Board therefore concluded that the rat display and the leaflet display did not constitute picketing.¹⁴

Applying this precedent, we conclude that the Union's conduct in the instant case does not constitute picketing. About 12 Union representatives and off-duty Union members stationed themselves approximately 100 feet from the entrance to the Employer's facility on a public sidewalk located on the street perpendicular to the street facing the facility, around the corner from the facility entrance. There was no patrolling and, due to their significant distance from the Employer's entrance, employees or guests approaching the facility did not have to pass through the Union supporters to enter.¹⁵ There is also no evidence of any blocking of ingress or egress. The Union supporters also did not engage in any intimidating behavior, such as positioning themselves in a manner that could be perceived as threatening by those

¹⁰ 356 NLRB 1290 (2011) (involving Section 8(b)(4)(B) secondary boycott allegation).

¹¹ See *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 346 NLRB 199, 203 (2006) (noting number of union members present), *enf. denied and remanded*, 491 F.3d 429 (D.C. Cir. 2007), *on remand to* 356 NLRB 1290 (2011).

¹² 356 NLRB at 1291.

¹³ *Id.* at 1292.

¹⁴ *Id.*

¹⁵ Cf. *Service Employees Local 535 (Kaiser Foundation)*, 313 NLRB at 1201 n.1 (concluding that union violated Section 8(g) where it did not provide ten days' notice and its representatives "mill[ing] around" in front of hospital entrance with signs constituted picketing). We also note that *Service Employees Local 535 (Kaiser Foundation)* was decided under the broad test for picketing later rejected by the Board in *Eliason* as inconsistent with Supreme Court precedent. *Id.* at 1202.

approaching the facility, keeping lists of employees or guests who entered, or taunting passersby. Like the bannering in *Eliason* and the rat and leaflet displays in *Brandon Medical Center*, the Union supporters did not engage in any conduct creating an actual or symbolic barrier as visitors entered or departed from the facility.¹⁶ Employees or guests were free to ignore the Union supporters and their signs.¹⁷ Thus, the element of confrontation necessary to constitute picketing was not met, and the Union was not required to give the ten-day notice required under Section 8(g) to engage in that non-picketing activity.¹⁸

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

¹⁶ *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 356 NLRB at 1292; *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB at 802-03. See also *Local Joint Executive Board of Las Vegas (Culinary Workers Union Local 226 and Bartenders Union 165)*, Cases 28-CP-081474 and 28-CP-083042, Advice Memorandum dated July 27, 2012 (concluding union did not violate Section 8(b)(7)(C) because rally and march was not picketing even where demonstrators marched along public sidewalk near the facility and union leaders carried and then delivered eight large petition-poster signs to management inside the facility).

¹⁷ The Union supporters' activity was not preceded or accompanied by unlawful picketing. Thus, passersby also would not have construed their activity as a continuation of any unlawful picketing.

¹⁸ See *Sheet Metal Workers' Int'l Ass'n v. NLRB (Brandon Regional Medical Center)*, 491 F.3d 429, 439-40 (D.C. Cir. 2007) (finding union's mock funeral and handbilling outside hospital were not picketing and thus union did not violate Section 8(g) by failing to provide the ten-day notice), *denying enforcement to* 346 NLRB 199 (2006); *California Nurses Association/National Nurses Organizing Committee (California Pacific Medical Center)*, Case 20-CG-69, Advice Memorandum dated June 26, 2008 (demonstration of 35 people walking and milling around on the sidewalk holding signs who did not block the lobby entrance or vehicles did not constitute picketing and thus union did not violate Section 8(g)); *California Nurses Association (Kaiser Foundation)*, Case 32-CG-45, Advice Memorandum dated April 22, 1999 (30 people standing outside of the employer's facility chanting slogans, singing songs, soliciting signatures on a petition, and displaying a large banner in effort to rally public support to keep the hospital open was not picketing and thus union did not violate Section 8(g)).