

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

Advice Memorandum

DATE: February 19, 2016

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Unite Here, Local 8 (Northwest Sound 560-2550-1700
Investment, Inc. d/b/a Rehab Seminars) 560-2575-6784
Case 19-CC-167121

The Region submitted this case for advice as to whether the Union: (1) violated Section 8(b)(4)(i)(B) by emailing and phoning a neutral company's independent contractors in an effort to induce them to withhold their services from the neutral; and (2) violated Section 8(b)(4)(ii)(B) by emailing and phoning the neutral company, the neutral company's independent contractors, and colleagues and clients of the independent contractors, all with the object of forcing the neutral to cease doing business with the primary employer.

We conclude that the Union did not violate Section 8(b)(4)(i)(B) by attempted inducement of the independent contractors, as independent contractors do not qualify as "individual[s] employed by any person" within the meaning of 8(b)(4)(i). We also conclude that the Union did not violate Section 8(b)(4)(ii)(B), inasmuch as the Union's communications did not rise to the level of "threat[s], coerc[ion], or restrain[t]" within the meaning of 8(b)(4)(ii).

FACTS

Unite Here Local 8 ("the Union") has a labor dispute with Grand Hyatt Seattle ("Hyatt"), where it has been attempting to organize workers for a number of years. In support of its labor dispute, the Union instituted a boycott against Hyatt in 2013. Northwest Sound Investment, Inc., d/b/a Rehab Seminars ("Rehab") organizes and hosts teacher-training conferences around the country. Rehab has only one full-time employee and two part-time employees. For the conferences that it organizes, Rehab uses independent contractors to teach the workshops and to provide trainings. Many of these speakers are affiliated with universities, publish in their field, and have consulting contracts with other clients (e.g., school districts, etc.). The speakers are booked for a specific event, pursuant to a written contract, and are paid a lump sum. If a speaker is popular, Rehab will likely invite the speaker to appear again the following year.

Rehab first hosted a conference at Hyatt in 2014. Although the Union contacted Rehab and requested that it honor the Union's boycott, Rehab proceeded with the conference anyway. Rehab was generally pleased with the success of the conference and with Hyatt's service and decided to host the conference at Hyatt again in 2015, and has a third conference scheduled for March 2016. In early December 2015, the Union again contacted Rehab and requested that it honor the Union's boycott and cancel its upcoming 2016 conference at Hyatt. Rehab declined. The Union called back several more times that week. Eventually, Rehab requested that the Union stop calling.

After Rehab made this request, the Union began emailing and calling Rehab's contracted speakers (both for the Seattle conference and other conferences), as well as the speakers' employers, colleagues, and clients. In the emails, phone conversations, and voicemails to the speakers, the Union informed the speakers of the labor dispute and requested that the speakers refrain from participating in Rehab's conferences until it canceled the conference at Hyatt.

In the course of its email appeal to the speakers' employers, colleagues, and clients, the Union contacted the faculty of several universities, as well as school districts throughout the country that some of the speakers had consulted for, and asked the recipients to encourage the speakers to cancel their participation in Rehab's conferences due to its relationship with Hyatt. Specifically, the Union's mass email read in pertinent part:

I am writing about your colleague, [name of speaker]. I have attempted to contact him multiple times about his role in a labor dispute in Seattle.

[Speaker] has a relationship with a company called Rehab Seminars, a group that puts on conferences about addressing student needs. For years, they have been violating the worker boycott at the downtown Seattle Hyatt hotels. [Speaker] has an opportunity to support hard-working women who scrub toilets for a living as they fight for justice in the workplace.

We are asking [Speaker] to cancel his participation in the event at the Grand Hyatt Seattle, and to urge Rehab Seminars to cancel all business there. Please encourage your colleague to do the right thing and stand up for Hyatt workers. ...

Rehab Seminars composes excellent educational programs that enhance quality of life for students from all backgrounds. An

organization that has such a strong record should not ignore and undermine women scrubbing toilets in hotels.

Please speak with your colleague as soon as possible, and encourage him to do the right thing.

One speaker reported that one of his clients, the Redwood City school district, informed him that the email it received from the Union “didn’t look good,” and he was afraid he might lose tens of thousands of dollars if the school district cancelled his contract. The school district also forwarded him an email it had received seeking copies under California’s public records act of all records related to its contracts with the speaker.

Another speaker left a voicemail with the Union requesting that the Union not contact him anymore. The Union then posted the voicemail to YouTube and sent out emails to the speakers’ colleagues and clients with a link to the voicemail, stating that the colleagues and clients might wish to reconsider the role they allow the speaker to play in a classroom with children. (In fact, the tone of the voicemail was polite but firm and unlikely to embarrass the speaker).

Yet another speaker, who is a professor at Virginia Commonwealth University, asked through campus police that the Seattle Police Department ensure that the Union stop contacting her and her colleagues. Shortly thereafter the professor discovered that the Union had made a Virginia Freedom of Information Act request for all documents relating to the professor, including email correspondence, performance evaluations, and any documents relating to grants the professor had received.

ACTION

We conclude that the Union did not violate Section 8(b)(4)(i)(B), given that the speakers are independent contractors and therefore not covered by that provision. We additionally conclude that the Union did not violate Section 8(b)(4)(ii)(B), as the Union’s various communications did not rise to the level of threats, coercion, or restraint.

Section 8(b)(4)(i) and (ii)(B) make it unlawful for a labor organization or its agents: (i) to induce or encourage employees to withhold their services from their employer or (ii) to threaten, coerce, or restrain any person engaged in commerce, where an object of the conduct is to force or require any person to cease doing business with any other person.¹ Thus, while a union may violate Section 8(b)(4)(i)(B)

¹ 29 U.S.C. § 158(b)(4)(i) & (ii)(B).

by merely requesting a secondary employer's employees to withhold their services, more than "mere persuasion" of a secondary employer itself is necessary to establish a violation of Section 8(b)(4)(ii)(B): that provision requires a showing of threats, coercion, or restraint.²

The Union did not violate Section 8(b)(4)(i)(B)

Section 8(b)(4)(i) specifically forbids inducing or encouraging "any individual employed by any person engaged in commerce."³ That phrase is not coterminous with the definition of "employee" at Section 2(3) of the Act.⁴ Prior to the 1959 Landrum-Griffin amendments, secondary appeals and boycotts were only unlawful if directed at those employees covered by the Act.⁵ In passing the 1959 amendments, Congress sought to erase this "loophole" and therefore additionally prohibit secondary appeals aimed at government employees, agricultural workers, employees covered by the Railway Labor Act, and minor supervisors.⁶

However, the Board has held independent contractors do not fall within Section 8(b)(4)(i)'s expanded scope. Thus, in *Local 294, Int'l Brotherhood of Teamsters, Etc.*, the Board affirmed the Trial Examiner's holding that a union did not violate Section 8(b)(4)(i)(B) by requesting that a trucker—who was an independent contractor— withhold his services from a secondary employer in support of the union's primary labor dispute.⁷ The Trial Examiner rejected the General Counsel's contention that, as an agent of the secondary employer, the trucker qualified as "an individual employed by" for purposes of Section 8(b)(4)(i).⁸ The Trial Examiner explained that such a

² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988).

³ 29 U.S.C. § 158(b)(4)(i).

⁴ *NLRB v. Servette, Inc.*, 377 U.S. 46, 52 (1964).

⁵ *Id.* at 51-52.

⁶ *Id.* at 51-52, & n. 6.

⁷ 131 NLRB 242, 253-54 (1961), *enforced*, 298 F.2d 105 (2d Cir. 1961).

⁸ *Id.*

theory would make employees of agents such as an attorney under retainer by a client, agents of theatrical performers, or real estate agents.⁹

In the instant case, the Region has determined that the hired speakers are unmistakably independent contractors. As such, they fall outside the ambit of Section 8(b)(4)(i). Accordingly, the Union's appeals to the speakers did not violate the Act.

The Union did not violate Section 8(b)(4)(ii)(B)

As noted above, a union's appeal to a neutral employer to cease doing business with the primary employer must rise to the level of threats, restraint, or coercion in order to violate Section 8(b)(4)(ii)(B).¹⁰ Therefore, a union's simple request that a neutral employer cease doing business with another employer, unaccompanied by threats or intimidation, is entirely lawful.¹¹ Thus, for example, in *Service Employees Local 525 (General Maintenance Co.)*, the Board found no violation where six union emissaries entered a neutral employer's premises—despite being asked to wait in the reception area—to hand-deliver a letter requesting the neutral's assistance in resolving the union's labor dispute with the neutral's janitorial contractors.¹²

Moreover, the Supreme Court has held that Section 8(b)(4)(ii)(B) should not be applied to a union's communications in such a way as to raise First Amendment concerns.¹³ In *DeBartolo*, a union had a primary labor dispute with a construction subcontractor engaged by a mall tenant to build a department store.¹⁴ The union

⁹ *Id.* See also *Plumbers Local Union No. 519, Etc.*, 137 NLRB 596, 597, n.5 (1962) (citing to *Local 294*, the Board explicitly disavowed the Trial Examiner's holding that a secondary employer's employee would have been covered by Section 8(b)(4)(i) even if the individual had been an independent contractor).

¹⁰ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 578.

¹¹ *NLRB v. Servette, Inc.*, 377 U.S. at 53-54 (no violation where union appealed to managers of neutral supermarkets to not stock products of the primary employer).

¹² 329 NLRB 638, 676 (1999), *affirmed and enforced on other grounds mem.*, 52 F. App'x 357 (9th Cir. 2002).

¹³ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 575-76.

¹⁴ *Id.* at 570.

peacefully handbilled the mall's entrances requesting that consumers boycott other (neutral) mall tenants until the mall's owner (also a neutral employer) pledged that all construction at the mall would be done using contractors who paid their employees fair wages and fringe benefits.¹⁵ The Court first explained that Section 8(b)(4)(ii)(B)'s proscription of threats, coercion, and restraint is "nonspecific, indeed vague" and that interpreting it to prohibit the union's peaceful handbilling would pose serious constitutional questions in light of the First Amendment, which the Court therefore declined to do.¹⁶ The Court additionally noted that the economic harm likely to flow to the neutral mall tenants as the result of a successful boycott did not transform the handbilling into coercion.¹⁷ The Court explained that although consumer picketing urging a boycott of a neutral employer is prohibited by Section 8(b)(ii)(4), picketing comprises a mixture of conduct and communication, and the conduct element often provides the most persuasive deterrent to potential consumers about to enter a neutral establishment.¹⁸ Handbills containing the same message, by contrast, are less effective because they "depend entirely on the persuasive force of the idea."¹⁹ Thus, the Court concluded, any loss of customers due to the handbilling at the mall would be due to mere persuasion, and the neutral who reacts to the loss of business in the way the union desires is doing only what its customers honestly want it to do.²⁰

Applying the Court's holding in *DeBartolo*, the Board in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)* found lawful a union's display of stationary banners at the entrance to neutral establishments that read "shame on [employer]" and "don't eat [here]."²¹ The Board explained that by enacting Section 8(B)(4)(ii)(B), Congress was focused on confrontational, ambulatory picketing rather than other forms of union communication.²² The Board conceded that although it has found some

¹⁵ *Id.*

¹⁶ *Id.* at 578.

¹⁷ *Id.* at 578-79.

¹⁸ *Id.* at 580 (citing *NLRB v. Retail Stores Employees (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)).

¹⁹ *Id.* (internal quotation marks and citations omitted)

²⁰ *Id.*

²¹ 355 NLRB 797, 798 (2010).

²² *Id.* at 810.

non-picketing conduct to be coercive within the meaning of Section 8(b)(4)(ii)(B), the common link binding those cases was some form of physical disruption of the neutral employer's premises.²³ In the absence of any such physical disruption or interference, and in light of the serious First Amendment questions that would be raised were the Board to find the stationary bannering unlawful, the Board concluded that the bannering did not amount to coercion, threats, or restraint under Section 8(b)(4)(ii)(B).²⁴

Here, the Union's communications to Rehab and to the speakers were clearly uncoercive and non-threatening. Thus, the emails and phone conversations and messages simply announced the existence of a labor dispute with Hyatt and requested that Rehab and the speakers honor the Union's boycott. Similar to the hand-delivery of a letter by union emissaries in *General Maintenance Co.* to a neutral employer requesting its support, the Union's communications amounted essentially to a mere request of neutral companies to support the Union by withholding their business from Hyatt, which is entirely lawful under Section 8(b)(4)(ii)(B).²⁵

Likewise, the Union's communications to the speakers' colleagues and other clients were lawful. As the Board observed in *Eliason & Knuth*, non-picketing conduct is typically unlawful under Section 8(b)(4)(ii)(B) only where it involves some physical disruption of the neutral employer's premises.²⁶ Here, the Union has not physically impeded or obstructed a neutral's business in any way. In this regard, the facts of the instant case are strikingly analogous to the facts in *DeBartolo*. Similar to the Union's effort in that case to economically pressure the neutral mall tenants through its consumer appeal, the Union here has sought to economically pressure the speakers through appeals to the speakers' colleagues and clients. If the speakers bow to such pressure and in turn place pressure on Rehab to cancel its conference at Hyatt, the

²³ *Id.* at 805-06 & n.29 (citing, *inter alia*, *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 820-823, 826-29 (2001) (union broadcasting message at extremely high volume through loudspeakers at condominium building that had engaged primary employer as a subcontractor coercive within meaning of Section 8(b)(4)(ii)(B)), *enforced mem.*, 50 F. App'x 88 (3d Cir. 2002); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71-72 (1991) (mass gathering of 50-140 people at motel housing strike replacements and agent who provided those replacements, with shouting and name-calling), *enforced*, 977 F.2d 1470 (D.C. Cir. 1992)).

²⁴ *Id.* at 797.

²⁵ *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB at 676.

²⁶ 355 NLRB at 805-06.

speakers will only be reacting to the “persuasive force of the idea” underlying the Union’s cause rather than to any physical intimidation or coercion.²⁷ Moreover, as discussed at length in *DeBartolo* and *Eliason & Knuth*, a finding here that the Union’s non-picketing communications violated Section 8(b)(4)(ii)(B) would raise serious constitutional questions under the First Amendment.

Furthermore, as to the Union’s mailing of the link to a YouTube voicemail recording of one of the speakers to that speakers’ colleagues and clients: 1) the statement that the recipients may wish to reconsider the role they allow the speaker to play with children in a classroom, while insulting, is not objectively worse than the banners in *Eliason & Knuth* that proclaimed “shame” on the neutral employers; and 2) inasmuch as the voicemail itself was polite and not embarrassing, recipients would be unlikely to view the speaker in a negative manner. As to the Union’s information requests to Virginia Commonwealth University and the Redwood City school district, it is unclear how a legal request for public records can constitute unlawful coercion or restraint. Finally, the sheer quantity of the Union’s emails, phone calls, and voice messages likewise does not render them coercive or threatening under Section 8(b)(4)(ii)(B) absent evidence of a physical disruption.²⁸

For the foregoing reasons the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

²⁷ See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 580.

²⁸ See *Service Employees International Union (Verizon-Maryland, Inc.)*, Case 5-CC-1258, Advice Memorandum dated December 6, 2002 (no violation where union sent such a large quantity of faxes to neutral CEO’s fax machine that the machine was rendered unusable for at least a day; disruption was of a sufficiently limited nature that it would be difficult to argue a violation of Section 8(b)(4)(ii)(B)).