

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

DATE: May 2, 2017

TO: Karen P. Fernbach, Regional Director
Region 2

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

SUBJECT: International Brotherhood of Electrical Workers, 536-0150-0100-0000
Local 3 536-1200
(Time Warner Cable New York City LLC) 536-2501-6500-0000
Case 02-CB-184756 536-2501-7000-0000
536-2501-8000-0000
536-2506

The Region submitted this case for advice on whether the Union violated Section 8(b)(1)(A) when its agents crossed in front of parking-lot exit gates as unit employees driving to service calls in their trucks were trying to exit, and distributed handbills updating these employees on alleged unfair labor practice charges against the Employer, thereby delaying the employees' departure.

We conclude that the Union did not violate Section 8(b)(1)(A), because it did not foreclose the employees' choice of whether to go to work rather than participate in a job action. In this regard, the Union's flyers were purely informational; the delays caused by the Union's actions were brief; employees who declined to take a flyer were not impeded from exiting the lot; and the handbilling was unaccompanied by any incidents of violence, threats, property damage, or similar conduct. Accordingly, the charge should be dismissed, absent withdrawal.

FACTS

Time Warner Cable New York City LLC (the "Employer") provides internet, phone, and television services throughout the country.¹ Its employees include a Northern Manhattan bargaining unit of service technicians and forepersons represented by the International Brotherhood of Electrical Workers Local 3 (the

¹ Charter Communications, Inc. purchased the Employer in 2016. See *Charter Merger Frequently Asked Questions*, <http://spectrum.net/support/general/merger-faq/> (last visited May 1, 2017).

“Union”). The parties have had a longstanding collective-bargaining relationship. Their most recent contract was effective from April 1, 2009 through March 31, 2013.

Service technicians are allotted time for each job based on the service requested. Installations typically take one to three hours to complete, and service calls typically take one hour.² Customers are informed ahead of time within what service window a technician will arrive. However, schedules may vary since appointments may go longer than expected, traffic could be unusually heavy on any particular day, or any other number of complicating factors may delay service technicians from arriving within the prescribed service window. Thus, the Employer regularly informs customers of delays in the technicians’ schedules as they travel to appointments.³

The parking lot at the Employer’s Northern Manhattan facility is used for parking both employees’ personal vehicles and company trucks and vans. There are two gates available to access and exit the parking lot; both are two-way gates. Before each of the cable technicians’ two shifts (beginning at 7:30 a.m. and 8:30 a.m.), employees enter the lot through either of the two gates, park their cars, and cross Ninth Avenue on foot to clock in at the Employer’s facility. After clocking in, employees walk back to the parking lot through one of the parking lot gates, enter their company vehicles, and drive to their service calls through either of the gates.

On September 20, 2016,⁴ dozens of nonemployee Union members and a few Union representatives gathered outside both of the parking lot gates. One Union representative was stationed at each gate to distribute flyers to employees who were exiting the parking lot in their company trucks on their way to service calls. Flyers were also occasionally distributed to employees exiting the lot in their personal vehicles or to employees who were entering the lot on foot. The two-sided flyers listed unfair labor practice allegations against the Employer and a copy of a Board charge filed in another unfair labor practice case.

² See *Installation/Service Visit: What to Expect*, <http://www.spectrum.net/support/internet/install-service-visit-what-expect/> (last visited May 1, 2017).

³ *Id.* (“You’ll receive a notification of your technician’s estimated time of arrival, as well as of any appointment delays.”).

⁴ All dates hereinafter are in 2016 unless otherwise noted.

As the vehicles neared the gates to exit the parking lot, several of the nonemployee Union members would cross in front of the gates, effectively requiring the vehicles to stop. At this point, a Union representative would approach the vehicle's driver-side window and attempt to hand the driver a flyer and engage in a brief discussion. According to the Union, the representative would greet the driver by saying, "how are you, brother?," hand him a flyer, and tell him to "stay safe." Approximately 75% of the employees would take the flyer. On occasion, they also would briefly speak with the Union representative about issues at the company. The video-surveillance evidence provided by the Employer shows that employees generally greeted their Union representatives warmly as they passed on foot, with some shaking their hands and hugging them on occasion. There is no evidence of any trucks honking or swerving while in line to try to pass through the gates more quickly, or of any other negative feedback from any employees about the flyer-distribution process. Nor is there evidence that employees who declined to take a flyer or otherwise interact with the Union representative, after momentarily stopping their vehicles, were prevented from exiting the lot.

The video-surveillance evidence shows that the vehicles experienced only brief delays. Of the approximately 100 company vehicles exiting the parking lot on September 20, thirty-one passed through the gates without waiting for a prior truck to exit or delaying another truck behind it. Those trucks cleared the gate at an average rate of approximately forty seconds per truck. Other vehicles had to briefly wait in line to exit. The footage shows that, at various times, a total of approximately eleven lines of exiting trucks formed and cleared during the period that the Union was handbilling. These lines ranged from two trucks to twenty-three trucks long, with an average of approximately four trucks per line. The longest any single truck could have been delayed by the Union's distribution of flyers, i.e., the last truck in the twenty-three truck line, is approximately twelve minutes.⁵ There is no evidence, or assertion, that any employee was late to a service appointment because of the Union's actions

After the handbilling had all but ended, the Employer called the police, who arrived at approximately 9:04 a.m. The police did not require the Union to cease its handbilling, instead recommending that the Employer set up cones along the sidewalk outside the parking lot gates. Accordingly, the Employer erected cones outside the left gate at 9:05 a.m. and closed the right gate at 9:08 a.m. Although the Union remained at the left gate until 9:28 a.m., only three trucks exited after the Employer erected the cones, each without having to wait for any other trucks to exit.

⁵ These figures are necessarily estimates because the video surveillance only shows a small part of the parking lot.

The Union representatives gave handbills to two of those drivers despite the cones, and left after no truck had passed for thirteen minutes.

For comparison purposes, the Employer submitted a security video showing the right gate on the morning of September 13. The video shows the company trucks smoothly exiting the gate, generally pausing briefly for traffic, and sometimes having to stop until an exiting truck in front of them cleared traffic. That video also shows conversations between employees standing around in the parking lot after clocking in, before leaving for service calls. One conversation began with a hug between two employees, joined briefly by a third employee, lasting approximately one-and-a-half minutes. Another conversation between two employees lasted approximately two minutes.⁶

With the exception of the multi-facility 1,700-member Union strike and ensuing strike-related actions that began on March 28, 2017, there is no evidence of Union handbilling or demonstrating outside of the Employer's Northern Manhattan parking lot since the conduct at issue in this case on September 20. And, prior to September 20, the only other recent significant Union action was a 30-minute to one-hour strike (depending on shift start times) on April 2, 2014, which closed down the street in front of the Brooklyn facility for ninety minutes and did not impact the Northern Manhattan facility.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(A), because it did not foreclose the employees' choice of whether to go to work rather than participate in a job action. In this regard, the Union's flyers were purely informational; the delays caused by the Union's actions were brief; employees who declined to take a flyer were not impeded from exiting the parking lot; and the handbilling was unaccompanied by incidents of violence, threats, property damage, or similar conduct. Accordingly, the charge should be dismissed, absent withdrawal.

A union's conduct violates Section 8(b)(1)(A) where it has a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights.⁷ The Board applies an objective test under which a violation does not depend on evidence that a

⁶ There was also a lengthy parking-lot conversation between two non-unit warehouse employees lasting approximately six-and-one-half minutes.

⁷ See, e.g., *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 815 (2001), *enforced*, 50 F. App'x 88 (3d Cir. 2002).

particular employee was actually restrained or coerced.⁸ Proof of actual intent to coerce is not required, although such evidence would support finding a violation.⁹

Section 7 protects employees' right to choose to work in the face of a union's appeal for assistance or support, i.e., to refrain from Section 7 activity.¹⁰ Therefore, a union violates Section 8(b)(1)(A) by, e.g., physically obstructing access to a workplace entrance¹¹ or otherwise preventing employees from carrying out their work tasks.¹² In such cases, the union's activity forecloses the employees' choice to work rather than supporting the union's efforts in the dispute.¹³ For instance, in *Gimbel Brothers*, the Board found that a union violated Section 8(b)(1)(A) when, as part of its campaign to achieve 100% membership in the union, its agents entered a department store, surrounded sales clerks on the selling floor, and maintained a loud, continuing commotion, including insulting employees for refusing to join the union.¹⁴ Although the union agents did not physically obstruct the sales clerks, the Board found that the union had forced the sales clerks to stop working "almost as effectively as if they had placed gags over their mouths or had pinioned their arms."¹⁵

⁸ *Id.*

⁹ *Id.* at 815 (citing *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 148 (1997)).

¹⁰ *See Tube Craft*, 287 NLRB 491, 493 (1987) ("Although peaceful picketing unquestionably includes the right to make nonthreatening appeals to those who are about to cross a picket line, the decision of such persons to ignore such appeals must be respected.").

¹¹ *Id.* (finding Section 8(b)(1)(A) violation when strikers physically obstructed entrance to prevent drivers from crossing picket line).

¹² *See Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 752 (2004) ("Clearly, the right of an employee to carry out his job functions free of union interference, restraint and coercion is no less protected than the statutory right of employees to cross a picket line without similar union interference."), *enforced*, 251 F. App'x 101 (3d Cir. 2007).

¹³ *See Tube Craft*, 287 NLRB at 493 n.7 (where employees were confronted with a picket line, "[w]hichever choice they made would have given support to one side or the other").

¹⁴ 100 NLRB 870, 877 (1952).

¹⁵ *Id.*

In contrast, in *Retail Store Employees Un., Loc. 428*, the Board found that a union did not act unlawfully when, on several occasions, before and after a representation election that was pending on objections, union agents entered the employer's retail store and engaged in discussions with management and salespersons. In finding no violation, the Board noted that the union did not seek to enlist the salespersons' support for any kind of action by the union and created only a "momentary disruption" of the salespersons' work, where, in one case, the salesperson was able to serve all of the customers "a few minutes later."¹⁶ Similarly, in *Carpenters Local 2012 (Forcine Concrete & Construction Co.)*, the Board found no Section 8(b)(1)(A) violation when union representatives concealed their union affiliation and questioned employees about their immigration status during work hours, thereby keeping them from working.¹⁷ There, the Board emphasized that, because the employees would not have connected the work interference with the union's solicitation of their support in a labor dispute, the employees were not "present[ed] . . . with a choice between engaging in protected activity or not."¹⁸

In determining whether a union has foreclosed employees' choice to work rather than supporting the union's efforts in a labor dispute, the Board has considered a number of factors, including: whether the union has refused to cease blocking access to the workplace despite the employees making clear that they wished to pass through the pickets and/or until forced to move by the police;¹⁹ the length of time that employees were blocked from working;²⁰ whether the actions were part of a pattern

¹⁶ 204 NLRB 1046, 1051-52 & n.15 (1973).

¹⁷ 358 NLRB 325, 326-27 (2012). Although *Carpenters Local 2012* was issued by a panel that, under *NLRB v. Noel Canning*, 143 S. Ct. 2550 (2014), was not properly constituted, it is the General Counsel's position that this case was soundly reasoned.

¹⁸ 358 NLRB at 327.

¹⁹ See, e.g., *Carpenters (Reeves, Inc.)*, 281 NLRB 493, 498 (1986) (observing that "[b]locking of ingress and egress of employees even for a short period of time until broken up by police to allow entrance or exit" has been found to violate Section 8(b)(1)(A)); *Local 1291, Longshoremen*, 266 NLRB 1204, 1207 (1983) (finding a violation where there were "several specific incidents in which pickets blocked the routes of trucks . . . and caused the trucks to leave the area without entering the terminal"), *enforced mem.*, 738 F.2d 423 (3d Cir. 1984).

²⁰ See, e.g., *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 655 (1999) (finding no violation where the union representatives blocked an employee

showing that the union's strategy was not limited to peaceful appeals for support;²¹ the relationship between the union representatives and the employees;²² whether the union interrogated the employees before they entered the workplace;²³ and whether the union engaged in violence,²⁴ threatened violence,²⁵ destroyed property,²⁶ or brandished weapons and threw objects,²⁷ during the job action.

from entering her jobsite, *inter alia*, because the entire episode “could not have taken more than a few minutes”), *enforced mem.*, 52 F. App'x 357 (9th Cir. 2001).

²¹ See, e.g., *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 436 (1995) (union violated 8(b)(1)(A) by refusing to allow employees to enter worksite on seven days, as “[i]t is evident that the picketing unions engaged in a pattern of conduct designed to harass and intimidate” the employees from working), *enforced in relevant part*, 154 F.3d 137 (3d Cir. 1998); *Operating Engineers Local 17 (Hertz Equipment Rental)*, 335 NLRB 578, 583 (2001) (union violated 8(b)(1)(A) where manager testified that he had to call the police at least once a day for five weeks in response to pickets blocking access to facility).

²² See, e.g., *Retail Store Employees Un., Loc. 428*, 204 NLRB at 1052 (union agents' conduct within store not coercive where salesmen initiated exchange of greetings with union agents and introduced union agent to manager, shortly after union election); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB at 655 (no violation where one union representative put his hand on an employee's shoulder as she attempted to go down a parking garage ramp to work because the union representative and employee were on friendly terms and had spoken on a number of occasions). Cf. *Machinists, Local 758*, 267 NLRB 1147, 1153 (1983) (finding 8(b)(1)(A) violation where, *inter alia*, union representatives called employees crossing the picket line “mother fucker,” “Son-of-a bitch,” and “asshole”).

²³ See, e.g., *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB at 436 (union violated 8(b)(1)(A) by requiring employees “to answer a laundry list of questions as a condition of reporting to work” because a union “has no right to arrogate to itself the authority to determine when and under what conditions employees may pass through its picket lines”).

²⁴ See, e.g., *Lithographers, Local 223*, 193 NLRB 11, 21 (1971) (union violated 8(b)(1)(A) by, *inter alia*, assaulting and attempting to assault employees crossing picket line); *Machinists, Local 758*, 267 NLRB at 1151, 1153, 1154-55 (union violated 8(b)(1)(A) when it engaged in numerous incidents of physical assault against employees as they tried to cross picket line).

²⁵ See, e.g., *Sheet Metal Workers Local 19 (Delcard Associates)* 316 NLRB at 430 (union violated 8(b)(1)(A) where, *inter alia*, it made death threats to employees

We conclude that the Union's September 20 conduct did not violate Section 8(b)(1)(A), because the Union did not foreclose the employees' choice to go to their service appointments rather than support the Union's efforts in its labor dispute with the Employer. As an initial matter, the Union was not seeking to induce *any* action by the employees; rather, the handbilling merely provided information to employees about the Employer's alleged unfair labor practices. Thus, although the Union effectively forced employees to stop their trucks briefly so that the Union representative could offer them a flyer, the employees were not confronted with a choice of whether to support the Union or go to work. The employees were free to accept or reject a flyer and go on their way after a brief delay. Accordingly, this case more closely resembles *Retail Store Employees Un., Loc. 428* and *Carpenters Local 2012 (Forcine Concrete & Construction Co.)*, in which employees were not forced to choose between supporting a union or going to work, than *Gimbel Brothers* and the cases in which unions physically required employees to honor a picket line or put picketers at risk of being run over.

Further, this case lacks the other factors the Board has considered when finding that a union violated Section 8(b)(1)(A). There is no evidence that any employee sought to circumvent a line of trucks to exit more quickly, and was denied that opportunity by the Union, or that any employee was prevented from exiting if he was among the 25% of employees who declined to take a flyer. Although the Employer summoned the police to the facility, they came after the handbilling was all but concluded and did not find it necessary to require the Union to cease its activities;

crossing the picket line); *Shopmen's Local Union No. 455*, 243 NLRB 340, 345 (1979) (union violated 8(b)(1)(A) when its picketers, *inter alia*, shook their fists and threatened to beat up managers and employees when they exited the worksite).

²⁶ See, e.g., *Lithographers, Local 223*, 193 NLRB at 21 (union violated 8(b)(1)(A) when, *inter alia*, it damaged the vehicles of employees trying to drive past the picket line); *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB at 430-31 (same).

²⁷ See, e.g., *Machinists, Local 758*, 267 NLRB at 1152-53 (citing incidents of brandishing a gun, rifle, and knife, and throwing rocks, bottles, and firecrackers). *Cf. Service Employees Local 50 (Evergreen Nursing Home)*, 198 NLRB 10, 12 (1972) (union did not violate 8(b)(1)(A), despite delaying two employees and one truck on their way into work and two trucks from leaving, and calling one employee a racial epithet, because it was not the kind of conduct 8(b)(1)(A) was designed to prevent; "[n]o one was injured, nothing was thrown, no one was prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises.").

indeed, the Union representatives continued communicating with two of the three employees who had yet to leave the parking lot.

Moreover, the handbilling happened on only one occasion, and the delay it created was short—forty seconds on average for a third of the exiting employees, who were not in a line. Most of the others, who were in lines of varying length, were delayed by only approximately one to two minutes. The longest delay was, at most, twelve minutes for the truck in the back of the longest line of trucks. These relatively minor delays did not prevent employees from doing their jobs. The Employer has provided no evidence that any drivers were late to their scheduled service appointments. In any event, minor delays are inherent to the Employer's business, even as the Employer aims for timely arrivals at customers' appointments. Thus, its drivers must navigate rush-hour Manhattan traffic, which, by its nature, involves risks of delays. As such, the Employer has a policy for updating customers regularly about employees' delays on service calls. Further, the video evidence from September 13, a week before the handbilling at issue, shows that several employees conversed in the parking lot for more than a minute after they clocked in and before leaving the lot for service calls.

Finally, the ample evidence of the friendly relationship between the Union and the employees (including handshakes and a hug) and the peaceful nature of the handbilling further militates in favor of dismissal. Indeed, as noted above, the Union estimates that 25% of the employees did not take a handbill, but there were no confrontations with the Union as these employees passed. This is in stark contrast to the plethora of Board cases finding that unions violate Section 8(b)(1)(A) in the context of strikes, when their actions are hostile and dangerous to employees who undermine the union's cause by going to work.

We reject the Employer's various arguments for finding a violation. First, the Employer cites a number of Board cases for the proposition that even blocking an employee's access to the workplace for a moment can violate Section 8(b)(1)(A). However, unlike here, each of those cases involved union agents who refused to move upon the employee's request or until the police forced them to move.²⁸ Relatedly, the

²⁸ See, e.g., *Plumbers, Local Union No. 195*, 233 NLRB 1087, 1093 (1977) (union violated 8(b)(1)(A), even though trucks were only detained momentarily by picket line, because “[t]he appearance of the police . . . was the only method by which these employees and supervisors were permitted to enter the plant,” and “[e]mployees seeking ingress to or egress from the plant are not obliged to call upon police assistance”); *Elec. Workers Local 98 (Tri-M Group, LLC)*, 350 NLRB 1104, 1107 (2007) (union violated 8(b)(1)(A) where pickets blocked employee from dumping load from

Employer's argument that the police caused the handbilling to end in this case is inaccurate, since, as noted above, the police did not arrive until the handbilling had all but concluded, they recommended only that the Employer set out cones outside the gates, and the Union was able to give flyers to the remaining employees even after the cones were placed. Third, we reject the Employer's argument that the contentious relationship between the parties proves that the handbilling was a ruse to delay employees on the way to work in order to pressure the Employer. To the contrary, although the parties were engaged in litigation, there is no evidence of a specific dispute at the Northern Manhattan facility or any other handbilling or picketing there prior to the strike that began on March 28, 2017. It is also significant that the only other strike activity between the parties was a short, isolated strike that occurred over two years earlier at another facility. And, there is no evidence that the Union's intent was to delay employees; indeed, the fact that the Union gave handbills to several employees who requested them while entering the parking lot on foot, and to personal vehicles exiting the parking lot without trucks following them demonstrates that the Union was primarily seeking to inform its members, not to create a delay at the jobsite. In any event, Section 8(b)(1)(A) concerns restraint or coercion against employees, not employers.

Accordingly, we conclude that the Union did not violate Section 8(b)(1)(A). To conclude otherwise, and find that a short interruption of unit employees' daily routine by a union peacefully distributing an informational handbill is coercive within the meaning of Section 8(b)(1)(A), would severely impede unions' protected communication with employees in a manner at odds with the policies and purposes of the NLRA. The Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

ADV.02-CB-184756.IBEWLocal3.TimeWarnerCable. (b) (6), (b)

backhoe and, even after police were called, pickets refused to move on two occasions as employee inched forward), *enforced*, 317 F. App'x 265 (3d Cir. 2009).