

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

DATE: November 27, 2013

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Capital Medical Center
Case 19-CA-105724

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This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by denying off-duty employees access to its property for the purpose of holding picket signs publicizing their contract dispute. We conclude that the employees were entitled to access outside areas of their worksite to engage in protected activities, including picketing. In the alternative, the Region should argue that the employees' conduct did not constitute picketing; therefore their Section 7 activity is comparable to protected after-hours distribution on employer property.

FACTS

Capital Medical Center ("Employer" or "Hospital") operates an acute care hospital in Olympia, Washington where United Food and Commercial Workers Union, Local 21 ("Union") represents a unit of service and technical employees. The parties' most recent collective-bargaining agreement expired on September 20, 2012 and the parties were unable to reach agreement on a new contract during subsequent bargaining. The Union began conducting informational picketing in February 2013 to publicize the contract dispute, which involved picketing and handbilling on the public sidewalk surrounding the Employer's campus.

In early May 2013, the Union notified the Employer that it again intended to conduct informational picketing and handbilling on May 20 from 6:00 a.m. to 6:00 p.m. The Employer informed the Union that it would permit handbilling on its property, but would limit picketing to the public sidewalk. It asserts that the Union agreed to those conditions.

On the day of the action, most of the participants were stationed on the public sidewalk.¹ Those on the sidewalk walked back and forth with picket signs containing slogans such as “Fair Contract Now,” “Respect Our Care,” and “Fair Wages.” These employees also passed out leaflets expressing the employees’ frustration with certain issues in the contract negotiations and thanking the recipient for their support. Between two and four off-duty employees also leafleted alongside two front entrances to the Hospital. At no point were employees stationed near the emergency room entrance, which was some distance from the main entrances.

At about 4:00 p.m., several off-duty employees carried their picket signs from the public sidewalk to the front entrances and stationed themselves about four feet away from the entry doors. No more than three or four employees ever held picket signs at either entrance at any one time. These employees did not patrol, and the Employer does not allege that they engaged in any behavior that was disruptive to patients or interfered with ingress or egress. No Union agents participated in this part of the action.

Almost immediately after these employees appeared at the entrances, a security guard informed them that they were not allowed to have picket signs at that location. They were told to either leave or limit their activity to leafleting. Despite repeated requests to cease holding signs, the employees remained. Two Union agents who were monitoring the day’s activities from the public sidewalk met with the Employer’s human resources manager and attorney to discuss the dispute. During this meeting, the Hospital’s attorney said that if the Union advises employees that they have a right to be at the entrances with picket signs, the Employer would have to discipline them. One of the Union agents asked if the Employer was going to discipline employees for engaging in protected union activity, and the attorney responded that he was not making that statement in front of employees. The Employer admits suggesting to the Union that it was unfairly putting employees at risk of discipline by directing them to refuse to cease picketing on Hospital property.

At some point, the Employer’s attorney approached one of the employees at the entrances. He told her that she was jeopardizing herself by being there with a sign, and that he had the authority to call the police and have her arrested for trespassing.

¹ In total, 68 Union members participated in the day’s events, but it appears that only between 25 to 30 members were on the public sidewalk at one time.

Indeed, the Employer contacted the police to complain about trespassing. The police responded, but they did not arrest anyone or issue any citations or warnings.

Around 6:00 p.m., all union activities ceased on the Employer's property and on the public sidewalk. The Employer never disciplined any employees for holding picket signs near the front entrances.

ACTION

We conclude that the employees were entitled to access outside areas of their worksite to engage in protected activities, including picketing. In the alternative, the Region should argue that the employees' conduct did not constitute picketing, and therefore it should be entitled to the same protection as after-hours distribution on employer property.

In *Tri-County Medical Center*,² the Board held that an employer cannot deny off-duty employees access to engage in protected conduct in outside non-work areas of its property, absent legitimate business reasons. Under the *Tri-County* standard, an employer may promulgate a rule restricting off-duty employee access to the employer's facility, but:

such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working areas will be found invalid.³

While employee appeals to the public are clearly protected by Section 7,⁴ the Board held in *Providence Hospital*⁵ that *Tri-County* did not apply to employees' appeals to the public on employer property. Thus, in *Providence Hospital*, nurses bargaining for a successor contract planned to engage in picketing and handbilling

² 222 NLRB 1089 (1976).

³ *Id.* at 1089.

⁴ *See, e.g., NCR Corp.*, 313 NLRB 574, 576 (1993) ("employees have a statutorily protected right to solicit sympathy, if not support, from the general public").

⁵ 285 NLRB 320 (1987).

near the entrance to their employer's facility to support their bargaining position.⁶ The employer restricted the off-duty nurses' activities to the public areas near the two driveway entrances to the hospital rather than to the private sidewalk in front of the main building.⁷ The Board did not apply *Tri-County* to the handbilling activities, distinguishing that case on the basis that the employees in *Providence Hospital* were targeting a public audience, rather than attempting to communicate with their coworkers, as in *Tri-County*.⁸ As to the picketing, the Board applied *Fairmont Hotel*,⁹ which set forth the then-current formulation of the *Babcock & Wilcox*¹⁰ balancing test for nonemployee access rights,¹¹ and concluded that the employer had lawfully denied access to the picketers because the public areas near the driveway entrances provided them with reasonable alternative means of communicating their message to the public.¹² The Board did not explain why it applied *Babcock & Wilcox*, which involved the more limited access rights of nonemployees, to the employees' picketing activities rather than *Tri-County* and *Republic Aviation*,¹³ which give greater rights to the employer's employees.

Although the Board did not expressly overrule *Providence Hospital*, it was unclear in subsequent cases whether that case's distinction based on employees' target audience was the legal standard that would be applied by the Board. For example, in *Stanford Hospital & Clinics v. NLRB*, the D.C. Circuit noted that "neither this court nor the Board has ever drawn a substantive distinction between solicitation

⁶ *Id.* at 320.

⁷ *Id.* at 321.

⁸ *Id.* at 322, n.8.

⁹ 282 NLRB 139 (1986).

¹⁰ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (requiring accommodation of Section 7 and property rights with "as little destruction of one as is consistent with the maintenance of the other" in case involving access rights of nonemployee union organizers).

¹¹ We use the term "nonemployee" as the Court did in *Babcock & Wilcox*, referring to an individual who is not employed by the Employer. We do not mean to suggest that union representatives are not statutory employees.

¹² *Providence Hospital*, 285 NLRB at 322.

¹³ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945).

of fellow employees and solicitation of nonemployees.”¹⁴ And in *Town and Country Supermarkets*,¹⁵ the Board found that an employer violated Section 8(a)(1) by denying employees’ *Republic Aviation* right to picket and handbill the public just outside the employer’s stores.

Recently, however, the Board appears to have resolved this uncertainty and made it clear that *Providence Hospital* can no longer be considered viable. In *New York New York Hotel & Casino*,¹⁶ on remand from the D.C. Circuit, the Board unequivocally repudiated any distinction based on employees’ intended target audience. *New York New York* involved employee handbilling in support of an organizing campaign. The employees worked for a separate restaurant employer within the New York New York hotel and casino. In order to reach their intended audience, the employee handbillers positioned themselves on the casino’s private property directly in front of two of the restaurants inside the hotel. The casino had the police remove the employee handbillers.¹⁷ The Board held that such conduct violated the Act.¹⁸

Significantly, in *New York New York*, the D.C. Circuit had specifically asked the Board to decide if there was any consequence to the fact that the restaurant employees were communicating to customers, rather than fellow employees.¹⁹ In answer to that question, the NLRB stated:

[W]hat matters here is less the intended audience of the [] employees than that the [] employees were exercising their own rights under Section 7 in organizing on their own behalf.²⁰

¹⁴ 325 F.3d 334, 343 (D.C. Cir. 2003).

¹⁵ 340 NLRB 1410, 1413-14 (2004).

¹⁶ 356 NLRB No. 119 (2011), *enforced*, 676 F.3d 193 (D.C. Cir. 2012).

¹⁷ *Id.*, slip op. at 1-2.

¹⁸ *Id.*, slip op. at 14.

¹⁹ *Id.*, slip op. at 9.

²⁰ *Id.* The Board majority also expressly disagreed with Member Hayes’ dissent, which would give lesser weight to employees’ right to communicate with the public, stating that “[t]he dissent would create an entirely new hierarchy of rights resting . . . on the manner of their exercise (self-organization via communication with other

In so finding, the Board quoted the language of *Stanford Hospital, supra*, finding no substantive distinction between solicitation of fellow employees and solicitation of nonemployees, and it approvingly cited *Santa Fe Hotel & Casino*,²¹ which found that an employer unlawfully prohibited employees from handbilling customers at the employer's entrances.²²

Since *New York New York* made clear that any distinction based solely on employees' target audience is no longer valid, *Tri-County*, rather than *Providence Hospital*, sets forth the applicable standard. Under *Tri-County*, as discussed above, an employer may not deny employees entry to parking lots and other outside non-working areas, unless justified by business reasons.²³

Applying *Tri-County*, we conclude that the Employer clearly did not have sufficient business reasons for denying access to employees holding picket signs at non-emergency entrances. In this regard, there is no evidence that the employees engaged in any misconduct or interfered with the Employer's operations. Indeed, the Employer's objection to the employees' presence is based solely on its property rights. Accordingly, we conclude that the Employer violated Section 8(a)(1) of the Act by denying off-duty employees access to its entrances to publicize the contract dispute using stationary picket signs, threatening employees with discipline for engaging in this activity,²⁴ summoning the police to the scene, and threatening an employee with arrest.²⁵

employees v. seeking support from consumers or the general public)." *Id.*, slip op. at 9, n.32.

²¹ 331 NLRB 723, 728-29 (2000).

²² 356 NLRB No. 119, slip op. at 9.

²³ 222 NLRB at 1089.

²⁴ We note that a threat of discipline communicated to a union representative, rather than directly to employees, is unlawful. *See Schrock Cabinet Co.*, 339 NLRB 182 (2003) (threat of stricter discipline and enforcement of rules if grievance filed unlawful where threat was made through the union agent).

²⁵ The Region should include this latter action as an allegation in the complaint based on the statements the Hospital attorney made to the off-duty employee, and should solicit an amended charge, if necessary. *See Town & Country Supermarkets*, 340 NLRB at 1414 (unlawful threat of arrest for picketing and handbilling in front of employer's store).

Whether the employees could reach their audience through alternative means under *Jean Country*²⁶ is irrelevant. In *New York New York*, the Board expressly declined to condition access in this manner where “employees are seeking to exercise their own statutory rights in and around their own workplace.”²⁷ In the Board’s view, such a prerequisite would unduly burden the Section 7 right in order to accommodate the property owner’s rights. Since the off-duty employees here were exercising their own statutory rights to publicize their labor dispute, the alternative means test is equally inapplicable here.²⁸

Further, in analyzing access rights of off-duty employees, the Board does not appear to distinguish between picketing and handbilling. Rather, an employer can only defend a denial of access on the grounds that the activity is disruptive to operations or otherwise conflicts with legitimate business concerns. While picketing might tend to be more disruptive, it is not necessarily so, and it is the employer’s burden to establish that the activity must be prohibited for business reasons. In *Town and Country Supermarkets*, the Board treated handbilling and picketing as being on equal footing in finding that the employer violated employees’ *Republic Aviation* rights by prohibiting both activities.²⁹ And the Board has repeatedly held that nonemployees become privileged to picket on employer property where the employer has granted other outside organizations access for non-business purposes.³⁰ Thus, the Board has treated picketing as on par with other forms of solicitation and distribution in access cases.

²⁶ 291 NLRB 11, 13-14 (1988) (weighing the property interest and the Section 7 right in light of the “availability of reasonably effective alternative means” to communicate the union’s message).

²⁷ 356 NLRB No. 119, slip op. at 13.

²⁸ Although we conclude here that *Jean Country* is not the appropriate analysis, there may be circumstances where it is useful as an alternative argument. However, the Region should not advance this argument here given that the picketing located on the public sidewalk was an apparently effective means of reaching the target audience.

²⁹ 340 NLRB at 1413-14.

³⁰ See *Pay Less Drug Stores Northwest*, 312 NLRB 972, 973-74 (1993) (shopping mall owner and store operator unlawfully ejected union pickets from sidewalk in front of store where mall routinely allowed other organizations to use its property for activities unrelated to mall business), *enforcement denied*, 57 F.3d 1077 (9th Cir. 1993) (table decision); *Davis Supermarkets*, 306 NLRB 426, 426-27 (1992) (employer unlawfully prohibited picketing and handbilling given that it had allowed sales and solicitations by outside organizations), *enforced on other grounds*, 2 F.3d 1162 (D.C. Cir. 1993).

In the alternative, the Region should argue that the employees holding stationary picket signs, absent patrolling, were not engaged in picketing. Thus, *Tri-County* principles apply here even if that case only applies to non-picketing Section 7 activities. In determining that the stationary display of a banner was not picketing in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*,³¹ the Board noted that picketing generally involves patrolling in front of an entrance while carrying picket signs.³² Such conduct is coercive because, in combination, those actions create a physical or symbolic confrontation.³³ Here, the employees did not patrol near the Employer's entrances; rather, they merely stood stationary while holding signs and did not block entry to the Hospital. Thus, their actions did not rise to the level of picketing. Although *Eliason* acknowledged that in some cases, stationary signs were treated as picketing where they were preceded by traditional picketing, this principle is not applicable to the instant case.³⁴ The Board later clarified that those cases involved circumstances where traditional picketing was time-limited, and the stationary picket was intended to operate as a signal to employees to honor the prior picket lines in circumvention of those statutory limits.³⁵ Here, there was no time limit to the traditional picketing located on the public sidewalk, and thus, the employees were not attempting to circumvent any statutory limitation by moving their picket signs to the front entrances. Further, the employees were not attempting to signal other employees that they should honor the picket line located on public property. Nor were they signaling patients that they should refrain from entering the Hospital, since the pickets and handbills did not urge a consumer boycott. Thus, these stationary picket cases are distinguishable, and the employees' actions here are comparable to handbilling and other persuasive conduct.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully denied off-duty employees access to its front

³¹ 355 NLRB No. 159 (Aug. 27, 2010).

³² *Id.*, slip op. at 6.

³³ *Id.*

³⁴ *Id.*, slip op. at 8.

³⁵ *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB No. 11, slip op. at 1-2 (Oct. 27, 2010).

entrances to publicize a contract dispute using stationary picket signs, threatened employees with discipline for engaging in this activity, summoned the police to remove them, and threatened an employee with arrest.

/s/
B.J.K.

ROFs – 0 (NxGen)

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