

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

Advice Memorandum

DATE: September 8, 2008

TO : James J. McDermott, Regional Director
Region 31

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

SUBJECT: United Steelworkers of America, AFL-CIO
(Vermont Hand Car Wash)
Case 31-CP-639

578-6000
578-8075-2017
578-8075-8050-5600
578-8075-8075

The Region submitted this case for advice on whether the Union violated Section 8(b) (7) (C) by picketing the Employer for more than 30 days, with an organizational and recognitional object, without filing a petition. We agree with the Region that the Union's conduct was protected by Section 8(b) (7) (C)'s publicity proviso and was therefore not unlawful.

FACTS

Steelworkers ("Union") and the Community Labor Environmental Action Network ("CLEAN"), a coalition of community organizations, are sponsoring a campaign to improve working conditions and organize car wash businesses in the Los Angeles area.¹ Vermont Hand Car Wash ("Employer") is a car wash in Los Angeles. Its employees are not represented by any union.

Carwash campaign begins

On March 12, 2008,² the Union sent a letter to the Employer and other car wash businesses throughout the Los Angeles area. The letter requested meetings to discuss "improving working conditions at the car wash and at other car wash businesses in the area." The letter further

¹ Although CLEAN is not a Section 2(5) labor organization, the Union's attorney has acknowledged that the Union and CLEAN are jointly responsible for the car wash campaign. Therefore, we assume, arguendo, that CLEAN and its members picketed as agents of the Union.

² All dates are in 2008 unless stated otherwise.

explained that the Union "seeks to organize and improve working conditions in the industry" and to "reach agreements" with car wash employers in order to improve car wash workers' living standards. The letter concluded by stating that the Union will seek to "bargain for wages, benefits and working conditions above the minimum standards as more employees in the industry choose to be represented."

On March 13, in response to the letter, Employer vice president Nisan Pirian called Union representative Paul Lee. Lee told Pirian that the Union's immediate interest was to improve working conditions in car washes, whereas its long-term goal was to unionize the industry. Lee suggested that they meet, but Pirian did not call him again.

On March 29, a CLEAN group faxed a letter to the Employer announcing the imminent picketing of its business. The letter stated that the purpose of the picketing was to publicize continued violations of minimum employment and occupational safety standards at the car wash and that such activity would continue until the Employer demonstrated that it had remedied such violations.

March 29 picketing

On Saturday, March 29, about 150 individuals from the Union and CLEAN picketed the Employer from 1:00 to 3:00 p.m. They carried picket signs displaying various messages of social justice and area standards/working conditions, and distributed handbills containing similar appeals. Each picket sign stated: "This carwash does not conform to the minimum employment standards established by California law. This sign is not for recognition or organizational purposes."

During the course of the picketing, Pirian spoke to Lee and the Union's attorneys. Lee told Pirian that the Union's goal was to organize the entire industry, but that it wanted to have a dialogue with him first. Pirian and Lee agreed to meet during the week. Union attorney Smith states that he told Pirian two times that the picketing would stop if the Employer abided by California's minimum employment standards and that its purpose was not to unionize the Employer.

April meetings

Pirian and Lee met twice in early April. They discussed the Union's professed desire to improve overall working conditions for carwash employees and the

competitive nature of the industry. Lee gave Pirian a document entitled "Clean Car Wash Agreement," which contains a neutrality agreement. Lee described the neutrality agreement as an acknowledgment that the Employer is willing to cooperate with the Union, which would result in an end to the picketing and the Union holding the Employer up as a good example. Pirian states that he asked Lee if his goal was to unionize the Employer. Lee replied, "Possibly, eventually yes," and indicated further that the Union had its organizational sights on the entire industry. Pirian requested time to review the neutrality agreement and consult with an attorney. Lee made several unsuccessful attempts to follow up with Pirian thereafter.

April 27 picketing

On Sunday, April 27, the Union and CLEAN picketed the Employer from 9:30 to 11:30 a.m. About 40 individuals were present, carrying picket signs and distributing handbills. The picket signs stated, "BOYCOTT Vermont Hand Wash!" in large, bold type. Below, in smaller lettering, but which could be read from at least 12 feet away, the signs stated, "It has no contract with the [Union]," and "No employees should strike, refuse to cross the picket line, not pick up, deliver or transport any goods, or not perform any service." The handbill, which was addressed to customers from CLEAN rather than the Union, stated in pertinent part, "Dear Carwash Customers, Vermont Hand Wash does not have a contract with" the Union. The handbills also stated that the Employer has "failed to comply with many basic minimum wage and hour laws" and "retaliated against workers who exercised their rights and spoke out against [the Employer's] exploitative employment practices." The handbill requested that consumers boycott the Employer until it addressed certain labor-related issues, including allowing the employees to "freely organize and seek union representation." Lee admitted that the Union's intent on April 27 was to call for a boycott of the Employer, in part, because it had no Union contract.

May 3 picketing

On Saturday, May 3, the Union and CLEAN picketed the Employer from 11:00 a.m. to 2:00 p.m. The handbills and a majority of the picket signs were identical to those on April 27. However, about 15 of the pickets from the Asian Pacific American Labor Alliance ("APALA") - a CLEAN group - carried different signs. These signs stated "CLEAN UP YOUR ACT"; "HONK Carwash Workers"; "RESPECT & DIGNITY"; or "GET CLEANED," but did not state that the Employer had no contract with the Union or did not employ Union members.

May 7 picketing

On Wednesday, May 7, about 30-35 individuals from the Union and CLEAN picketed the Employer. The pickets distributed the same handbills and carried the same signs as on April 27. In addition, a 7-by-12 foot banner was present. The banner, which remained stationary during the picketing, stated only "BOYCOTT VERMONT HAND WASH."

The Employer provided the Region with a link to a video on the internet capturing certain activity at or near the picket line. In this seven-minute video, an unidentified man announces a boycott against the Employer for retaliating against workers, not allowing them to organize, and for not signing an agreement that incorporates workers' health, safety, and labor rights.

On May 7, a delivery truck with cleaning supplies was unable to enter the Employer's driveway because of the picketing. Instead of entering the driveway, the deliveryman parked his truck on the street, unloaded supplies to a dolly, and walked them to the car wash. Instead of the customary 20-minute delivery time, the delivery took almost 90 minutes.

May 10 picketing

On Saturday, May 10, about 15-20 individuals picketed the Employer from 1:00 to 3:00 p.m. The signs were identical to those on April 27, except that the statement that the Employer "has no contract with the [Union]" was in a larger font. The participants distributed the same handbills that they had distributed since April 27.

June picketing and letter

The Union picketed the Employer's facility on two or three occasions in early June. The picket signs were identical to those on May 10. Also, in a letter dated June 4, the Union affirmatively advised members of other unions that they should continue making deliveries to the Employer and that such services shall not constitute "crossing a picket line" because "[t]his picketing is aimed solely at members of the public, including consumers."³

³ The Union's attorney has represented to the Region that he will strive to assure continued statutory compliance.

ACTION

We agree with the Region that the Union's conduct was protected by Section 8(b)(7)(C)'s publicity proviso and was therefore not unlawful.⁴ Accordingly, the charge should be dismissed, absent withdrawal.

Union picketing of an unorganized employer, which has as its goal either the organization of the employer's employees,⁵ or voluntary recognition by the employer,⁶ violates Section 8(b)(7)(C) when it is conducted without an election petition being filed within a reasonable period of time from its commencement, not to exceed 30 days. In determining whether union picketing is for an object proscribed by Section 8(b)(7)(C), the Board considers the totality of the circumstances.⁷ To establish a violation, it is only necessary that an object of the picketing be organizational or recognitional; that is, it need only be one of the reasons for the picketing.⁸

Where a union has engaged in organizational or recognitional picketing for more than 30 days without filing a Section 9(c) petition, the picketing violates Section 8(b)(7)(C) unless it is "informational" picketing within the scope of the publicity proviso. To fall within the proviso, such picketing must: (1) be "for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization"; and (2) not have the effect of inducing a work stoppage.⁹

⁴ As discussed below, we conclude that the March 29 picketing was not proviso-protected, but, since there was only a single instance of such picketing, this did not violate Section 8(b)(7)(C).

⁵ See, e.g., New Otani Hotel & Garden, 331 NLRB 1078, 1080 n.6 (2000); Chefs, Cooks Local 89 (Cafe Renaissance), 154 NLRB 192, 192 (1965).

⁶ See, e.g., Building Service Employees Union, Local 87 (Liberty House/Rhodes), 223 NLRB 30, 36 (1976).

⁷ Id. at 33.

⁸ Ibid.

⁹ Hotel & Restaurant Employees Local 681 (Crown Cafeteria), 135 NLRB 1183, 1184-1185 (1962), review denied 327 F.2d 351 (9th Cir. 1964).

To meet the proviso's first requirement, the pickets' message need not reiterate the precise proviso language as long as the signs "embod[y] in substance the language of the publicity proviso."¹⁰ Further, the mere fact that proviso-protected picketing is occurring simultaneously with other union activities for recognition, bargaining, or organization does not remove proviso protection.¹¹ Moreover, it is well-established that publicity picketing does not lose the proviso protection when conducted simultaneously with handbilling or other conduct that provides additional details related to the labor dispute.¹² On the other hand, where picketing, ostensibly directed at the public, is in fact not for that purpose but, rather, directed at employees, it is not protected by the proviso.¹³

¹⁰ Retail Clerks Local 1404 (Jay Jacobs Downtown), 140 NLRB 1344, 1346 (1963) (picket signs stating that employer was nonunion, asking public to shop elsewhere, and listing stores where public could shop was within proviso). See also Carpenters Dist. Council of St. Louis (Vestaglas, Inc.), 136 NLRB 855, 856-857 (1962) (picket signs that stated "EMPLOYEES DO NOT BELONG TO THE A.F.L.-C.I.O. AND HAVE SUBSTANDARD WAGES AND WORKING CONDITIONS" were within the proviso).

¹¹ Local Joint Executive Board of Hotel Employees (Crown Cafeteria), 135 NLRB at 1185 ("the proviso applies where organization, recognition, or bargaining is an object"); Construction Laborers Local 1140 (Lanco Corp.), 227 NLRB 1247, 1247 n.2 (1972), *enfd.* 577 F.2d 16 (8th Cir. 1978), *cert. denied* 439 U.S. 1070 (1979) (the proviso "carves out an exception" to the general ban on organizational or recognitional picketing).

¹² Retail Clerks Local 400 (Jumbo Food Stores), 136 NLRB 414, 422 (1962) (picketing and handbilling protected by publicity proviso where picket signs included statutory proviso language, even though handbills stated, in part, that employer did not maintain prevailing wages and undermined living standards).

¹³ Electrical Workers Local 3 (Jack Picoult), 144 NLRB 5, 8 (1963), *enfd.* 339 F.2d 600 (2d Cir. 1964) (finding that picketing was not within proviso where it took place near delivery entrances and places not frequented by members of the public; apparent that picketing was not directed at achieving limited purpose of communicating with public but "was also intended to be precisely that 'signal' to organized labor which Congress sought to curtail").

In construing the proviso's second requirement, the "effect clause," the Board evaluates the "actual impact" upon the picketed employer's business; picketing can be proviso-protected, even if there were deliveries not made or services not performed, if it does not actually interfere with the employer's business.¹⁴

Here, the Union had an organizational and recognitional object throughout its campaign. In both its March 12 letter and the follow-up telephone conversation of March 13, the Union told the Employer that its ultimate goal was to organize the car wash industry.¹⁵ Union representative Lee reiterated this point in a conversation with Pirian during the picketing on March 29. Thus, "an" object of the March 29 picketing was organizational or recognitional, even though the picket signs bore "area standards" language.¹⁶ The Union also evinced an organizational object shortly thereafter, in early April, when it requested that the Employer sign a neutrality agreement.¹⁷ Finally, the language on the handbills and most of the picket signs from April 27 onward indicated an

¹⁴ Retail Clerks Local 324 (Barker Bros.), 138 NLRB 478, 491 (1962), review denied 328 F.2d 431 (9th Cir. 1964) (the "presence or absence of a violation will depend on whether the picketing has disrupted, interfered with, or curtailed the employer's business").

¹⁵ NLRB v. Sheet Metal Workers Local 3 (McCarthy Heating), 662 F.2d 513, 514 (8th Cir. 1981) (per curiam), enfg. 253 NLRB 330 (1980) (communicating desire to organize employees in future, even though no present desire to do so, reflects organizational or recognitional object).

¹⁶ Although a Union attorney states that he told Pirian on March 29 that the Union's goal was not to unionize the Employer, a position reflected on the picket signs, we would not find this to be an effective disclaimer in light of Lee's contradictory statements that day and the Union's subsequent conduct inconsistent with the purported disclaimers. Electrical Workers IBEW Local 3 (Hunts Point Elec.), 271 NLRB 1580, 1582-1583 (1984) (evidence of conduct inconsistent with the declared intent of the picketing will "raise an issue as to its true object").

¹⁷ See, e.g., SEIU Local 3 (Executive Management Services, Inc.), Cases 25-CC-838, et al., Advice Memorandum dated November 30, 2007; UNITE (Hennes & Mauritz d/b/a H & M), Cases 2-CP-1040, et al., Advice Memorandum dated January 21, 2004; IUOE, Local 17 (Zoladz Construction), 3-CP-398, Advice Memorandum dated June 11, 2003.

organizational and/or recognitional object,¹⁸ and Union representative Lee admitted that the April 27 picketing had a recognitional object.

However, notwithstanding the Union's organizational and recognitional object, its picketing after March 29 was informational picketing protected by the publicity proviso of Section 8(b)(7)(C). Thus, the picket signs used from April 27 through June, with minor exceptions, truthfully informed the public that the Employer has no contract with the Union.¹⁹ And, there is no evidence that the picketing actually targeted employees rather than consumers.²⁰

The fact that the handbills also contained additional details about the dispute, or that some of the May 3 APALA picket signs lacked proviso language, did not remove the picketing from the proviso's protection, because the predominant picketing message fell within the proviso.²¹ For example, in Jumbo Food,²² union demonstrators carried signs that included the statutory proviso language but also distributed handbills stating, in part, that the employer did not maintain prevailing wages and undermined the living standards of food store employees in the community. The

¹⁸ Roofers Local 11 (Funderburk Roofing), 331 NLRB 164, 167 (2000) (picket signs stating that employers do not have a contract with a union indicate a recognitional objective).

¹⁹ Although the Employer contends that the picket signs lacked proviso language on April 27, May 3, and May 7, the evidence indicates that such language was, in fact, present (other than on some of the May 3 APALA signs), albeit in smaller print than the boycott language.

²⁰ Cf. Electrical Workers Local 3 (Jack Picoult), 144 NLRB at 8.

²¹ Similarly, the May 7 banner, which had no proviso language, did not divest the picketing of the proviso's protections. We do not need to decide whether the banner, alone, would constitute "picketing" within the meaning of Section 8(b)(7)(C), because the demonstration also featured traditional picketing. [FOIA Exemption 7(A)]

.]

²² Retail Clerks Local 400 (Jumbo Food Stores), 136 NLRB at 414.

Board adopted the ALJ's finding that the picketing had a recognitional object, based on the union's prior organizing campaign and demand for recognition, but found that the picket signs, along with the simultaneous handbilling, were proviso protected.²³

The picketing here also complied with the proviso's second requirement because it did not have the effect of inducing a stoppage of deliveries or services. The Employer argues that the May 7 picketing caused a 70-minute delay in the delivery of cleaning supplies. Although the delay inconvenienced the deliveryman, there is no evidence that it actually disrupted the Employer's business.²⁴ Moreover, the Union's picket signs and handbills announced a desire not to interrupt deliveries or cause a work stoppage.²⁵ Accordingly, the picketing on May 7 retained

²³ Id. at 415, 417, 420-422. See also UNITE HERE, Local 217 (Waterford Venue Services Hartford LLC), Case 34-CP-24, Advice Memorandum dated January 10, 2007 (where picket signs conformed to proviso and handbills contained additional messages - such as employer's unwillingness to sign labor peace agreement, to give priority hiring to Hartford residents, and to disclose wages - conduct fell under protections of proviso); Cleveland Moving Picture Operator's Local 160 (Ashtabula Entertainment Corp.), Case 8-CP-324, Advice Memorandum dated March 16, 1989 (where picket signs and some of handbills contained precise statutory language, and other picket signs and handbills contained additional messages - such as "22 terminated without notice" and "Do not patronize this theatre, unfair to local school students" - the "predominant picketing message" fell under protections of proviso).

²⁴ See Retail Clerks Local 57 (Hested Stores), 138 NLRB 498, 501-502 (1962) (one service stoppage and one temporary service delay of a few hours at a retail variety store did not deprive picketing of the proviso's protection, as there was "no evidence that these incidents in any way interfered with, disrupted, or curtailed" the business). Compare Teamsters Local 1205 (Island Coal & Lumber Co.), 159 NLRB 895, 901 (1966), enfd. 387 F.2d 170 (2d Cir. 1967) (suppliers' refusal to enter employer's premises required employer to divert its own personnel from their usual functions to pick up supplies at distant locations; employer forced to "modify its method of doing business with suppliers whose products were essential to its daily operations").

²⁵ See Retail Clerks Local 1404 (Jay Jacobs Downtown), 140 NLRB at 146-147 (finding that picketing did not have statutory "effect" on employer's business, in part, because

the protection of the publicity proviso, and there are no other allegations that the post-March 29 picketing had the effect of inducing a stoppage of deliveries or services.²⁶

Based on the above, only on March 29 did the Union engage in recognitional or organizational picketing that was not protected by the publicity proviso. Because such picketing lasted only one day, rather than an unreasonable period not to exceed thirty days, the Union did not violate Section 8(b)(7)(C).²⁷ Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

of union's efforts to ensure that deliveries would continue notwithstanding its picketing activities).

²⁶ The Employer asserts that the March 29 picketing prevented the installation of a new compressor - a device that sprays soap and water on cars - until March 30, and that this resulted in refunds for customers who complained that their cars were not cleaned properly. We need not decide whether the compressor incident constituted an "effect" sufficient to remove the protection of the proviso because it is undisputed that the picketing of March 29 was not proviso-protected. Laborers Local 275 (S. B. Apartments), 209 NLRB 279, 279-280 (1974) (no need to address whether non-proviso picketing had "effect" of inducing stoppage of deliveries or services).

²⁷ Carpenters Local 2361 (Adams Insulation), 248 NLRB 313, 314 (1980), affd. mem. 652 F.2d 61 (9th Cir. 1981) (one day of picketing insufficient for 8(b)(7)(C) violation). Compare Electrical Workers Local 265 (R P & M), 236 NLRB 1333, 1339 (1978), enfd. 604 F.2d 1091 (8th Cir. 1979) (picketing on two separate occasions separated by 42 days violated 8(b)(7)(C)).