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

Advice Memorandum

DATE: December 20, 2001

TO : Ralph R. Tremain, Regional Director
Leo D. Dollard, Regional Attorney
Karen L. Rengstorf, Assistant to Regional Director
Region 14

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

SUBJECT: Miscellaneous Drivers, Health Care &
Public Employees Local 610, a/w IBT
(Fort Zumwalt School District)
Case 14-CC-2459

and

(Francis Howell School District)
Case 14-CC-2460

560-2550-8333
560-2575-6767
560-7540-4000
560-7540-4020-5000
560-7540-4020-5033
560-7540-8040-3300
560-7540-8040-3375

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(B) of the Act by picketing two school districts that had taken over their school bus operations when the Union engaged in a strike against the districts' school bus service provider. We conclude that this picketing is unlawful because the school districts, as "separate persons" from the bus service provider, did not lose that status and the protection of Section 8(b)(4)(B) under the "ally" doctrine by continuing to maintain certain aspects of their contracts with the provider. We also agree with the Region that other Union defenses regarding a separate primary dispute, constitutionality of the picketing, and absence of jurisdiction over the school districts lack merit.

FACTS

1. Pre-Strike Background

First Student provides school bus services for students in the Fort Zumwalt and Francis Howell school districts located in the St. Louis Metropolitan area. The Fort Zumwalt district is comprised of 21 schools and approximately 12,000 of its students rely on school bus services. The Francis Howell district is comprised of 18 schools and approximately 14,000 of its students rely on school bus services.

Pursuant to their contracts with First Student, each district provides district-owned property and space for garaging, maintenance, fuel storage, and offices. First Student is obligated to provide the buses needed in each district, employees to operate and maintain the buses, and dispatching personnel. First Student must also pay for all parts and fuel necessary to the operation of the buses. The buses used in both districts display First Student's name on the front, rear, and sides of each bus.

In November 1997, Teamsters Local 610 ("the Union") was certified in Cases 14-RC-11838 and 14-RC-11848 as the representative of units of drivers and monitors employed by First Student in the Fort Zumwalt and Francis Howell districts, respectively. The collective bargaining agreements between First Student and the Union expired on July 1, 2001.[1] Negotiations for successor agreements have failed to produce new contracts; wages constitute the principal impediment to the reaching of new agreements.

2. The Strike and Picketing

On October 1 and October 10, First Student employees working in the Fort Zumwalt and Francis Howell districts, respectively, commenced economic strikes. School entrances and exits became congested as parents were required to transport their students to and from school each day. As a result of the congestion, school start times were delayed and accidents occurred ranging from minor fender-benders to students being struck by vehicles.

By letters dated October 17 and October 29, Fort Zumwalt and Francis Howell, respectively, notified First Student and the Union that if they were unable to resolve their contractual disputes by November 5, the district intended to invoke the *force majeure* provisions in its contracts with First Student and assume operation of the buses.[2]

The *force majeure* clause in the Fort Zumwalt contract provides that in the event First Student is unable to

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[1] All dates are in 2001 unless otherwise indicated.

[2] Local media outlets carried extensive coverage of the strikes and reported that the school districts intended to assume operation of the buses and would be conducting job fairs on November 6 to solicit applications for temporary bus drivers.

provide transportation services due to certain specified events, including strikes, the district shall have the right to take over the buses that First Student is prevented from operating. This provision further states:

> The DISTRICT shall pay to [First Student] for such buses the same amounts specified in the heretofore mentioned rate less all excess reasonable and equitable expenses and costs incurred by the DISTRICT in securing the services of said operations personnel.

The provision in the Frances Howell district similarly states that in the event of a strike:

> The District, at its sole option, may assume control of the buses, equipment, facilities, and supplies necessary for the continued operation of the system and compensation otherwise payable to [First Student] by the District shall be reduced proportionately. In addition, [First Student] will reimburse District for all expenses including reasonable attorney fees incurred as a result of [First Student's] inability to perform.

On November 6, each district attempted to hire bus drivers by holding a job fair at schools located in their respective districts.[3] Pickets appeared at each job fair with signs stating that the school district is "unfair" and identifying the Union as responsible for the picketing. On November 13, second job fairs were held and pickets again appeared with the same signs. The districts received fewer than 15 applications from these job fairs.

On November 7 and 12, the Union also picketed the Francis Howell district's central office with signs stating that the district is "uncooperative" and "unfair" and again identifying the Union as responsible for the picketing. On November 10 and 11, the Union picketed the private residences of the Francis Howell district superintendent and school board members using similar signs.

On November 7, the school districts filed the instant charges alleging that the Union violated Section 8(b)(4)(B) by engaging in picketing for the purpose of coercing each school district to cease doing business with First Student

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[3] [*FOIA Exemptions 6, 7(C), and 7(D)*] the school board established a beginning rate of pay higher than First Student's beginning rate.

and/or to discourage individuals from seeking employment with the districts.

ACTION

We conclude that the Region should issue a Section 8(b)(4)(B) complaint, absent settlement, and initiate appropriate 10(l) proceedings, on the theory that the Union unlawfully picketed the school districts with which it does not have a primary dispute in the absence of evidence establishing the school districts were "allies" of First Student.

It is well established that the secondary boycott provisions in Section 8(b)(4)(B) aim to "shield[] unoffending employers and others from pressures in controversies not their own."[4] Thus, a union violates Section 8(b)(4)(B) when it directs its picketing in furtherance of a labor dispute against an employer that is not a party to that dispute.[5] The ally doctrine is a well-recognized defense to such picketing and is available where the neutral employer against whom the union's pressure is directed has "entangled himself in the vortex of the primary labor dispute."[6] In those circumstances, the allegedly neutral employer loses the protection of Section 8(b)(4) by performing work "which would otherwise be done by the striking employees of the primary employer . . . pursuant to an arrangement devised and originated by [the primary] to enable [it] to meet [its] contractual obligations."[7]

It is also well established that a customer of the primary does not become an ally when it takes "independent self-help initiatives as necessary to permit [it] to

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[4] Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 146, 156 (1983).

[5] See generally Teamsters Local 85 (Graybar Electric), 243 NLRB 665, 668, 671 (1979) (by picketing with signs naming the neutral, union was protesting neutral's use of the primary and thereby attempting to coerce the neutral to cease doing business with the primary).

[6] National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612, 627 (1967).

[7] NLRB v. Business Machine and Office Appliance Mechanics Conference Board, Local 259 (Royal Typewriter), 228 F.2d 553, 559 (2d Cir. 1955).

continue its business."[8] In most cases, the independent self-help initiative undertaken by the customer is transferring the work that the primary can no longer perform to another employer for completion. Where that transfer of work is accomplished by the customer, rather than the primary, the Board consistently finds that the employer performing the work does not forfeit its neutral status.[9]

The Board focuses on different factors in determining whether the ally doctrine applies where, as here, the customer undertakes to perform the work of the striking employees itself, rather than transferring the work to another employer. In two cases addressing this issue, the Board has held that the customer did not forfeit its neutral status where its performance of the work provided no economic benefit to the primary employer and did not enable the primary to insulate itself from the economic impact of the strike.

In SEIU Local 32B-32J (Dalton Schools),[10] Allied Maintenance had a contract with Dalton Schools to perform routine maintenance and janitorial work. Allied's employees engaged in an economic strike against Allied and picketed the school's premises. Allied supervisors continued to work

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[8] Blackhawk Engraving Co. v. NLRB, 540 F.2d 1296, 1301 (7th Cir. 1976).

[9] See, e.g., United Maritime Division Local 333, NMU (D. M. Picton & Co.), 131 NLRB 693, 698-99 (1961) (neutral employer did not become ally by performing work previously performed by striking employees where customer arranged for the neutral to perform the work); OCAW (Western Indus. Maintenance), 213 NLRB 527, 529 (1980) (same). See also Teamsters Local 413 (The Patton Warehouse), 140 NLRB 1474, 1482-83 (1963) (struck goods clause that permitted employees to refuse to perform services that would have been performed by employees of primary struck employer unlawful, where it exceeded the scope of the ally doctrine by failing to provide that the struck work be transferred to their employer through an arrangement with the primary), enfd. in relevant part 334 F.2d 539 (D.C. Cir. 1964). Compare Royal Typewriter, above, 228 F.2d at 559 (where primary instructed customers to have independent companies perform its work and send it the bill, the independent companies were "allies" of the primary even though the primary did not contact the independents directly).

[10] 248 NLRB 1067 (1980).

at the school during the strike to complete at least some of the work in order to carry out Allied's contractual obligation.[11] In defense of the picketing, the union argued that Dalton was not neutral because it performed "struck work" by performing the cleaning work that Allied employees had performed. The ALJ rejected that argument and concluded that Dalton was merely "attending to its own needs as a neutral employer." In support of that conclusion, the ALJ found that the performance of the work was of "no economic benefit to Allied," and did not permit Allied to "escape the economic impact of the strike," since Dalton paid Allied only for the work that Allied performed during the strike, a "sum considerably less than Allied would normally receive due to the receipt by Dalton of considerably diminished services."[12]

The Board adhered to this principle in another case involving a customer that undertook to perform services that the struck primary was no longer able to perform. In Teamsters Local 776 (Pennsy Supply),[13] Drivers leased employees to Pennsy to drive Pennsy trucks loaded with Pennsy's cement and gravel product to various contractors. When Drivers' employees went on strike, Pennsy used its own employees and drivers from other companies to drive its vehicles. The Board found that the striking employees unlawfully picketed Pennsy and rejected the union's defense that Pennsy became an ally of Drivers by using its own employees to perform the work previously performed by the striking employees. One reason the Board rejected the ally doctrine defense was that, as in Dalton Schools, Pennsy's performance of the work was of no economic benefit to

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[11] Although Allied was present at the school during the picketing, the union failed to identify Allied on the picket signs, and thus did not comply with Moore Dry Dock, 92 NLRB 547 (1952). 248 NLRB at 1069.

[12] Id. The Board did not establish the precise parameters of this analysis, e.g., whether there could be an economic benefit to a primary based on the continuation of a contractual relationship with the customer in circumstances where the customer makes reduced payments but in an amount that results in profits for the primary similar to pre-strike profits.

[13] 313 NLRB 1148 (1994).

Drivers, i.e., it did not enable Drivers to continue its business relationship with Pennsy with no loss of profit.[14]

We conclude that the instant case is similar to Dalton Schools and Pennsy Supply. The school districts' implementation of the *force majeure* provisions has resulted in reduced contractual payments to First Student in exchange for the diminished services it now provides. Thus, it does not appear that First Student is receiving an economic benefit from the districts' performance of the driving work, and thereby escaping the economic consequences of the strike.

Pursuant to the *force majeure* provision in the Francis Howell district agreement, the compensation paid to First Student is reduced in proportion to the services that are no longer being provided by First Student, i.e., the district is now paying only for the lease of the buses without the requisite drivers and dispatchers. Thus, First Student is not receiving the profit it would normally receive for supplying drivers.

Pursuant to the *force majeure* provision in the Fort Zumwalt district agreement, the district continues to make contractual payments less any expenses incurred in operating the buses. Under this arrangement, the Region notes that First Student could profit from the district's operation of the buses if the district incurred lower, or even the same, expenses than First Student would have incurred. However, the evidence indicates that the school district is paying its drivers more than First Student paid drivers.[15] In these circumstances, First Student could not profit from Fort Zumwalt's assumption of the bus operations.

We reject the several remaining arguments made by the Union in support of its picketing activity. First, the Union argues that it has a separate and distinct primary dispute with the districts. According to the Union, its dispute with the districts became primary once the districts announced that they intended to take over the operation of the buses. However, the picketing is not addressed to labor relations between the district and its own employees, but rather has the object of pressuring the school districts to

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[14] Id. at 1148 n.2, 1168 (unlike the facts here, Board and ALJ also noted lack of contractual obligations for Pennsy to use, or Drivers to supply, employees, but only set compensation rates if Drivers actually performed services).

[15] [*FOIA Exemptions 6, 7(C), and 7(D)*].

pressure First Student to resolve its labor dispute with the Union. The fact that the districts have the authority to choose which employees will operate the buses does not transform the Union's picketing into primary picketing.

Second, we reject the Union's argument that its picketing activity was intended to petition the government for redress of its grievances, and is thus protected by the First Amendment and the Missouri Constitution. The Supreme Court has held that picketing in furtherance of an unlawful secondary object, as here, is not protected by the First Amendment.[16]

Finally, the Union argues that its picketing activity is beyond the Board's jurisdiction because the school districts are an exempt entity. However, the school districts fall within the Act's definition of "person" and thus are entitled to the Board's protection from secondary activity proscribed by Section 8(b)(4)(B).[17]

Accordingly, absent settlement, the Region should issue a Section 8(b)(4)(B) complaint alleging that the Union's picketing directed at the Fort Zumwalt and Francis Howell school districts is unlawful secondary activity because the school districts are neutral employers.

B.J.K.

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[16] See NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins.), 447 U.S. 607, 616 (1980), and cases cited there (Section 8(b)(4)(B) "imposes no impermissible restrictions upon constitutionally protected speech").

[17] See Local 63, Electrical Workers (Whitman Electric), 201 NLRB 875, 878 (1973), and cases cited (school board, a political subdivision, is a "person" entitled to protection under 8(b)(4)(B)). See also Local 25, Teamsters v. New York, New Haven and Hartford R.R. Co., 350 U.S. 155, 160 (1956) (railroads not excluded from the Act's definition of person and are entitled to Board protection from Section 8(b)(4)(B) conduct).