

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

Advice Memorandum

DATE: August 15, 2003

TO : Celeste J. Mattina, Regional Director
Karen P. Fernbach, Regional Attorney
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Region 2

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

SUBJECT: Construction and General Building Laborers, 578-2025-6700
Local 79 (C&D Restoration, Inc.) 578-2025-6725
Case 2-CP-1036-1 578-2025-6775

This case was submitted for advice on whether the Union engaged in unlawful picketing under Section 8(b)(7)(C) and (A) where, on several dates between March 19 and April 25, between 10 and 100 Union agents patrolled in front of workplace entrances near the Employer's jobsites, chanting, blowing whistles, handbilling, and occasionally drumming and using a bullhorn, and where the Union displayed a large inflatable rat on several of those occasions. We conclude that the Union's conduct amounted to recognitional picketing, and, because that picketing continued for more than 30 days from its commencement, the Region should issue a Section 8(b)(7)(C) complaint. We find no violation of Section 8(b)(7)(A) because the Employer has produced insufficient evidence that it had a bargaining relationship with another union.

FACTS

The Employer, C&D Restoration, performs exterior restoration work on building facades in New York City. The Employer contends that it is a party to a collective bargaining agreement with Bricklayers and Allied Craftworkers Local Union No. 1, New York, that covers all employees who perform restoration work. The Employer produced a Memorandum of Understanding between Local 1 and an entity called C&D Contracting adopting the terms of a collective bargaining agreement between Local 1 and the Building Restoration Contractors Association. Despite the Region's request, the Employer declined to produce any information on the relationship between C&D Contracting and C&D Restoration.

1. Events at 4 Park Avenue - September/October 2002

In late September or early October 2002, Local 79 representatives distributed leaflets at an Employer jobsite

at 4 Park Avenue for two days from approximately 8 a.m. to 3:30 p.m. The first day, the Union had an inflatable rat set up during leafleting. The second day, the rat was not present. There is no evidence as to what the leaflets said, and Local 79 engaged in no other activity at this jobsite.

2. Events at 365 Fifth Avenue - March 19 to March 27, 2003

The Employer had a project renovating the façade of 365 Fifth Avenue, a commercial building occupying the entire block between 34th and 35th Street between Fifth and Madison Avenue. Occupants of the building include a branch of the New York Public Library, which has a main entrance on Madison Avenue and a second entrance on 34th Street; the City University of New York, which has a main entrance on Fifth Avenue and a second entrance on 34th Street; and Oxford Press, which has an entrance on Madison Avenue.

On several days between March 19 and 27, 2003, Union agents, some of whom wore Local 79 jackets, engaged in the following activity:

a. March 19

Beginning at around 8 a.m., 14 to 16 people distributed leaflets at the corners of 34th Street and Fifth and Madison Avenues. A large, inflatable rat was set up on 34th Street in front of a bus stop, west of the entrance to the New York Public Library. Two men with "Labor Organizer" jackets approached project manager Brian Kirk and said, "You know we've got a rat outside, and we're going to set up a picket line." At noon, the group, which now numbered 20 to 22 people, walked in a circle in front of the 34th Street entrance to the library and distributed leaflets. The group chanted, "What do we want? Union! When do we want it? Now!" and other similar slogans. This conduct continued until 1 p.m., when some members of the group left to distribute leaflets along Madison Avenue between 34th and 35th Street.

b. March 20

The rat was inflated around 7 a.m. and placed on 35th Street near the corner of Madison Avenue. At around 9 a.m., about 12 to 14 people began walking in a circle in front of the entrance to Oxford Press on Madison Avenue between 34th and 35th Street, distributing flyers and chanting. The activity continued until about 2:30 p.m. During this time, a member of the Union's group approached Kirk and said, "Why don't you and your guys join the Union?" Kirk said he belonged to Local 1, and the two men discussed Local 1 and Local 79's jurisdictional dispute.

c. March 21 and 24

On both March 21 and 24, an Employer project manager observed the inflatable rat at the job site at 7:30 a.m. but no individuals or activities. There is no other evidence regarding any activities on these dates.

d. March 25

From about 9 a.m. to 12:30 p.m., about 10 to 12 men with Local 79 jackets walked in a circle in front of the entrance to Oxford Press, blowing whistles, distributing flyers, and chanting. The inflatable rat was again on 35th Street near the corner of Madison Avenue. Union representatives told Kirk that he should join Local 79 and then called Local 79 supervisor Hector Fuentes so that Kirk could speak to him. Kirk asked Fuentes whether Local 79 just wanted the Employer "to put a guy on this job" or to sign a general contract. Fuentes replied, "Your boss has to come in and sit down with one of the union delegates and negotiate a bargaining agreement."

e. March 26

From about 9 a.m. to 12:30 p.m., about 10 to 12 people with Laborers jackets walked in a circle in front of the entrance to Oxford Press, distributing leaflets, blowing whistles, and chanting. The inflatable rat was again placed on 35th Street near Madison Avenue. During these activities, Fuentes asked Kirk why Kirk's boss had not called and said that the Union would be there until the boss called.

f. March 27

From about 8 a.m. to 1 p.m., about 10 to 12 people with Laborers jackets walked in a circle in front of the entrance to Oxford Press, blowing whistles, distributing leaflets, and chanting. The inflatable rat, this time wearing a sign saying "C&D Restoration," was again placed on 35th Street near Madison Avenue.¹

¹ The only leaflets in evidence for the period of activity from March 19 through March 27 publicized the Employer's alleged OSHA violations, and workers compensation and DOL liabilities.

3. Events at 400 East 85th Street

a. April 22, 2003

The Employer also had a job at 400 East 85th Street, a residential building at the corner of 85th Street and First Avenue. The building residents' entrance is on 85th Street, about 55 feet east of First Avenue. C&D employees enter the job site through a service entrance about 30 feet east of the residents' entrance.

On April 22, beginning after 8 a.m., about 30 people, some wearing "Labor Organizers" jackets, walked in a circle, whistling, shouting, and drumming on the sidewalk on 85th Street in front of the residents' entrance. The people distributed two leaflets accusing the Employer of bid rigging and workplace safety violations.

In addition to the leafleting, a large inflatable skunk was placed in a pick-up truck parked in front of the First Avenue side the building. The leafletters wore no signs, and none were placed at the job site. The leafleting continued for about two hours. One of the leafletters approached an Employer representative and said, "Why don't you back us up?" The Employer replied, "How can I back you up when you've tried to take my work away?" The demonstrators left around 10 a.m.

b. April 25

Similar activity took place on Friday, April 25. About 30 individuals again walked in a circle in front of the residents' entrance from about 7:30 to 9:30 a.m. The group was chanting, drumming, and blowing whistles. Individuals distributed leaflets on each corner of First Avenue and 85th Street, but there were no signs. The large inflatable skunk was again displayed on First Avenue.

4. Events at 365 Fifth Avenue - April 25

Later that morning, on Friday, April 25, at about 11 a.m., a group of about 100 people some wearing Local 79 jackets, appeared at 365 Fifth Avenue between 34th and 35th Street. The people proceeded to walk around the entire block. One carried a large American flag, at least one had a drum, but none had signs or placards. The majority of people blew whistles and chanted slogans such as, "Hey hey, ho ho, C&D has got to go," and one individual used a bullhorn. Several individuals were also distributing flyers on Madison Avenue between 34th and 35th Street and on the corner of 34th Street and Madison Avenue.

After walking around the block, the group convened in front of the 34th Street side entrance to the library (between Madison and Fifth Avenue) and walked in a circle. When people entered or exited the library, the group moved to the sides of the entrance to provide space. The group did not distribute leaflets but continued to blow whistles and chant slogans.

The group then moved to the middle of 34th Street, toward the side entrance of the City University of New York. The group continued walking in a circle in front of the entrance.

Around 12:15 p.m., Kirk had a conversation with Fuentes. Fuentes told Kirk that he did not know that Kirk belonged to Local 1. Kirk replied that he had told him that last time. Fuentes said, "Why don't you do the right thing and tell your Employer to sign with us?" Kirk said the Employer had already signed with Local 1 and would not sign with Local 79.

After a fifteen-minute break, the group resumed walking in a circle in front of the University side entrance and chanting. After 10 or 15 minutes, the group again walked around the entire block. When they again arrived at the 34th Street entrance to the University, they jumped up and down and yelled for about one minute. The group dispersed at 1 p.m.

There is no evidence that anyone was prevented from entering or leaving the building during the group's activities, and the Employer was not prevented from receiving any deliveries that day. No employees stopped working, and no inflatable animals were used at this location on this date.

Local 79 has not engaged in activities at any C&D job site since April 25.

ACTION

We conclude that absent settlement, complaint should issue, alleging that the Union unlawfully engaged in picketing beyond the 30-day period proscribed by Section 8(b)(7)(C). Because there is insufficient evidence that the Employer had a Section 9(a) relationship with Local 1, the complaint should not allege a Section 8(b)(7)(A) violation.

A. Section 8(b)(7)(C) Violation.

Union picketing of an unorganized employer, which has as its goal either the organization of the employer's employees,² or voluntary recognition by the employer,³ violates Section 8(b)(7)(C) when from the picketing's commencement the union fails to file an election petition within a reasonable period of time not to exceed 30 days. We find that activity here violated Section 8(b)(7)(C) because it was recognitional, constituted "picketing," and continued 30 days beyond its commencement without the filing of a representation petition.⁴

First, the Union's admissions demonstrate its recognitional object here.⁵ Thus, on March 25, the Local 79 representatives told Kirk that his "boss" had to come and negotiate a bargaining agreement with Local 79. The next day, Fuentes told Kirk that his boss had not called and that he would be there until his boss called. Then, on April 25, Fuentes told Kirk, "Why don't you do the right thing and tell your company to sign with us?" Such statements indicate that the activities would cease when recognition was achieved and constitute explicit admissions that Local 79 had a recognitional object both in March and in April.⁶ Recognition or organization need not be the sole object of picketing for a violation of Section 8(b)(7)(C) to arise; rather it is sufficient if it is one of the reasons for the

² See, e.g., New Otani Hotel and Garden, 331 NLRB 1078, 1080 fn.6 (2000); Hotel & Restaurant Employees Local 89 (Cafe Renaissance), 154 NLRB 192, 192 (1965); Typographers Union (Greenfield Printing), 137 NLRB 363, 372-374 (1962), enfd. 326 F.2d 634 (D.C. Cir. 1963).

³ See, e.g., Building Service Employees Union, Local 87 (Liberty House/Rhodes), 223 NLRB 30, 36 (1976).

⁴ See Hotel and Restaurant Employees Local 274 (Warwick Catering), 269 NLRB 482, 482 (1984).

⁵ See, e.g., Retail Clerks Local 345 (Gem of Syracuse), 145 NLRB 1168, 1172 (1964) (language of leaflets proved union's recognitional object); Philadelphia Window Cleaners & Maintenance Workers (Atlantic Maintenance), 136 NLRB 1104, 1105-06 (1962) (picket signs inviting employees to "join our union" proved organizational object).

⁶ See Operating Engineers Local 101 (St. Louis Bridge), 297 NLRB 485, 491 (union's demand for a signed contract evinces a recognitional object).

picketing.⁷ Accordingly, the recognitional object is established.

Second, we conclude that, under the totality of the circumstances, the Union's activity between March 17 and April 25 constituted "picketing." Picketing involves a "'mixture of conduct and communication,'" and does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'"⁸ While traditional union picketing involves individuals patrolling while carrying placards attached to sticks, the Board has long held that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.⁹ Rather, the essential feature of picketing is the posting of individuals at entrances to a place of work.¹⁰ In addition, the Board has stated that "'[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises.'"¹¹ Thus, because of its confrontational nature, the presence of mass activity involving crowds that far exceed the number of

⁷ St. Helens Shop 'N Kart, 311 NLRB 1281, 1286 (1993).

⁸ See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568, 580 (1988), quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

⁹ See, e.g., Lawrence Typographical Union 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968) (finding picketing within the meaning of 8(b)(7)), citing Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

¹⁰ Mine Workers District 2 (Jeddo Coal Co.), 334 NLRB 677, 686 (2001); Service Employees Local 87 (Trinity Building Maintenance), 312 NLRB 715, 748 (1993), enfd. 103 F.3d 139 (9th Cir. 1996); Lumber & Sawmill Workers, 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971) (finding picketing within the meaning of 8(b)(7)).

¹¹ Chicago Typographical Union 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2^d Cir. 1964).

people necessary for solely free speech activity may constitute picketing.¹²

Here, we conclude that on the whole, the Union's conduct was confrontational and constituted picketing. Thus, between March 19 and March 27, the totality of circumstances, including between 10 and 22 Union individuals patrolling in front of entrances to businesses at 365 Fifth Avenue; the chanting, whistling, and leafleting; the deployment of a large, inflatable rat close to the patrollers;¹³ and the Union's admission on March 19 that it was setting up a picket line, all establish that the Union was using conduct, rather than speech, to induce a sympathetic response.¹⁴ This conduct, considered in its

¹² See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992)(finding mass picketing in violation of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Truax-Traer Coal Co., above, 177 NLRB at 218 (finding picketing in Section 8(b)(7)(C) case where approximately 200 union agents arrived at the worksite and congregated around or in their parked cars).

¹³ The deployment of a large, inflated rat, a well-known symbol of labor unrest, has contributed to a finding of picketing in other cases. See San Antonio Community Hospital v. Southern California District Council of Carpenters, 125 F.3d 1230, 1236 (9th Cir. 1997) (noting that one of definitions of "rat" is employer who fails to pay prevailing wages); see also Local 78, Asbestos, Lead and Hazardous Waste Laborers (Hampshire House), Case 2-CC-2581, Advice Memorandum dated June 25, 2003 (display of large, inflatable rat, along with other activity, contributed to finding of picketing); Laborers (Pavarini Construction Co.), Case 12-CC-1262, Advice Memorandum dated April 25, 2003 (same); Sheet Metal Workers, Local 15 (Brandon Regional Hospital), Case 12-CC-1258, Advice Memorandum dated April 4, 2003 (same); Local 79, LIUNA (Renam Development, LLC), Cases 2-CC-2559-1 et. al., Appeals Minute dated April 13, 2003 (same); Local 79, LIUNA (Calleo Development Corp.), Cases 2-CC-2546, et al., Appeals Minute dated January 24, 2003 (same).

¹⁴ The Region should not allege that the Employer engaged in unlawful picketing on March 21 and 24. Without evidence that Union officials were monitoring the rat or even present, there is insufficient evidence of confrontational behavior to establish picketing. See NLRB v. United

entirety, created a "gauntlet" that forced pedestrians to confront the Union in order to enter the building. Thus, while the Union's conduct was missing the hallmark of message bearing placards, the patrolling in front of entrances, particularly in large numbers and while engaging in loud conduct, is also evidence of picketing.¹⁵

The Union also engaged in picketing on April 22 and April 25, when about 30 and later 100 individuals patrolled business and residential entrances near the Employer's worksites at 400 East 85th Street and 365 Fifth Avenue. In Trinity Building Maintenance, the Board affirmed the ALJ's finding that 40 individuals patrolling in front of a main entrance for two hours with small red flag banners and chanting slogans constituted picketing, even in the absence of "message bearing placards."¹⁶ Thus, even in the absence of any picket signs or incidents, the patrolling of entrances by large numbers of individuals necessarily "entail[s] some element of physical restraint upon the patrons."¹⁷ Here, on April 22 and 25, 30 individuals at the 85th Street location circled the apartment building entrance while chanting, drumming, whistling, and using bullhorns.¹⁸ Then, later on April 25, 100 individuals demonstrated at

Furniture Workers of America, 337 F.2d 936, 939-40 (2d Cir. 1964) (where no indication that men parked in cars were either in close proximity to signs displayed or could be seen by anyone entering plant, insufficient evidence to find picketing), distinguishing Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 857 (1962) (where signs stuck in snowbanks, custodians sat in their cars nearby, and truckdrivers having business with company refused to make deliveries, picketing found), enfd. 314 F.2d 53 (2d Cir. 1963).

¹⁵ See Trinity Building Maintenance, 312 NLRB at 748.

¹⁶ Id.

¹⁷ Service and Maintenance Employees Union, Local 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 436 (1962).

¹⁸ While the Union displayed a large inflatable skunk at the 400 East 85th Street location, we do not rely on the Union's display of a skunk to conclude that the Union's activity on these dates was picketing. A skunk, unlike a rat, has no historical significance in the labor movement and does not, by its mere display, operate as a signal to employees or passerbys to take any particular action.

365 Fifth Avenue, again patrolling in front of entrances and using drums, bullhorns, whistles, and chanting. Given their large numbers, their noisemaking activities, and, most significantly, their patrolling of building entrances, the activity constituted picketing under Trinity Building Maintenance.¹⁹

Finally, we conclude that the Union engaged in the recognitional picketing for more than 30 days. It is well established that picketing for a proscribed object that does not comply with the statute's second proviso²⁰ and that continues for a period of more than 30 days from its commencement is unlawful, "regardless of its sporadic character within that time period."²¹ The Union engaged in activity constituting "picketing" on seven occasions spanning more than 30 days from the activity's commencement.²² Since the Union's activity and its

¹⁹ The patrolling of the entrances distinguishes this case from Service Employees Local 525 (General Maintenance Co.), 329 NLRB 638, 683 (1999) (no picketing found where 40 to 50 demonstrators wearing justice for janitors uniforms marched to building entrance and held brief rally; no evidence of picket signs, patrolling, blockage, or confrontation), and Alden Press, 151 NLRB at 1669 (no picketing found where demonstrators marched through public malls carrying placards where activity was not centered on any one establishment and where parading was through large public areas).

²⁰ The informational proviso is inapplicable here because the handbills did not advise the public that the employer did not have union members or a contract with the Union, as required by the proviso. See Electrical Workers, IBEW, Local 113 (I.C.G. Electric), 142 NLRB 1418, 1419 (1963).

²¹ Culinary Workers, Local 62 (Tropicana Lodge), 172 NLRB 419, 422-23 (1968); see Butchers' Union, Local 120 (M. Moniz Portuguese Sausage Factory), 160 NLRB 1465, 1467 (1966) (picketing for 9-10 days intermittently during 36 day period without filing petition violated Section 8(b)(7)(C)); Electrical Workers, IBEW, Local 265 (R P & M), 236 NLRB 1333, 1339 (1978) (picketing for three days intermittently during 45 day period without filing petition violated Section 8(b)(7)(C)), enfd. 604 F.2d 1091 (8th Cir. 1979); Operating Engineers, Local 4 (Seaward Construction), 193 NLRB 632, 632 (1971) (picketing on nine occasions intermittently in eight week period without filing petition violated Section 8(b)(7)(C)).

²² Union picketing took place on March 19, 20, 25, 26, 27, and April 22 and 25.

recognitional purpose – demonstrated by its March 19 and April 25 demands for a contract – spanned more than 30 days, the Union violated Section 8(b)(7)(C) of the Act.²³

B. Dismissal of Section 8(b)(7)(A) Allegation.

Section 8(b)(7)(A) prohibits picketing or threats to picket with an organizational or recognitional object when the employer "has lawfully recognized. . . any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of the Act."

We agree with the Region that the Employer has failed to establish that it had a Section 9(a) relationship with Local 1. Thus, while Local 1 may have a Section 9(a) relationship with a company called C&D Contracting, the Employer declined to provide any information on the relationship between C&D Contracting and C&D Restoration. Accordingly, this allegation should be dismissed, absent withdrawal.²⁴

Thus, absent settlement, a Section 8(b)(7)(C) complaint should issue.

B.J.K.

²³ The Union's activities in September/October 2002 should not be alleged in the complaint because there is insufficient evidence that that activity was in support of a recognitional object.

²⁴ The Board has held that a contract provision could independently establish a Section 9(a) relationship in the construction industry where the provision met certain requirements. See Staunton Fuel & Material, Inc. d/b/a Central Illinois Construction, 335 NLRB No. 59, slip op. at 4 (2001); Verkler, 337 NLRB No. 18, slip op. at 2 (2001) (applying Staunton where Section 9(a) relationship was created by employer signing on to a multiemployer agreement containing Staunton language). We note, however, that the D.C. Circuit has called into question the Board's decision in Staunton. See Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-37 (D.C. Cir. 2003).