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

Advice Memorandum

DATE: December 30, 2004

TO : Robert H. Miller, Regional Director
Region 20

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

SUBJECT: Northern California Millwrights Local 102
Case 20-CC-3423

This case was submitted for advice as to whether the Union's demonstration at one of Anheuser-Busch Inc.'s ("ABI") breweries violated Section 8(b)(4)(ii). We conclude that the Union's entire course of conduct at this demonstration -- including (1) stationing a large number of members wearing anti-ABI tee shirts in ABI's small lobby and tour center, (2) driving around the parking lot with an SUV pulling a trailer with an anti-ABI billboard on it, and (3) stationing an inflatable 15 foot rat, suspended 40-50 feet in the air, at the entrance to the access road to the facility – constituted confrontational conduct tantamount to picketing and violative of Section 8(b)(4)(ii).

FACTS

On October 23, 2004, Millwrights Local 102 (the Union) held a tee shirt day at Anheuser-Busch, Inc.'s ("ABI") brewery in Fairfield California to coincide with ABI's publicized annual visit of its Clydesdale horses to its daily brewery tour. The object of the Union's event was to protest ABI's use of out-of-state contractors, some union and some non-union, on approximately $140 million worth of capital improvements being made to its facility.

The demonstrators arrived in a convoy of cars and parked in the lot designated for visitors. There were about 100 of them, and 70 of them wore identical lime-green tee shirts that bore the following message: on the front was a picture of a rat identified as "Budweiser" with the statement "Stop outsourcing our jobs to out of state contractors and out of state workers"; on the back was the statement "This Bud ain't for me. Stop the outsourcing. Support local jobs for working families." On each shirt was a self-adhesive badge that said "102." Most of the demonstrators went to the lobby, where they filled the room and dwarfed in number the approximately 20 regular visitors who showed up for the morning's tours. The demonstrators were not initially loud or disruptive but became so when ABI managers told them that they could not go on a tour unless they removed their shirts or turned them inside out, and

that they would have to leave if they weren't going on a tour. While the demonstrators were in the lobby, ABI took non-demonstrating visitors through an internal side door to start the tours, since the main door between the lobby and the upstairs tour center was blocked by the group of demonstrators. ABI states that tours were delayed by up to an hour and that some visitors left before taking a tour.

While the demonstrators were in the lobby, Union agents drove a Ford Bronco SUV pulling a trailer with a large billboard on it around the parking lot. The billboard said "Budweiser, stop outsourcing our jobs to out of state contractors and out of state workers. Brought to you by the Millwright Local 102. This does not constitute a work stoppage or work slowdown" (the last sentence in smaller print). The truck was driven up and down the aisles of the parking lot several times. After security personnel asked the driver to park or leave, the driver continued to drive and honk his horn. When asked a second time to leave (after police had been called but before they had arrived), the driver departed the parking lot but turned into a restricted area and continued to honk his horn.

Throughout the demonstration, two individuals in the same tee shirts stationed themselves at an intersection a quarter mile from the brewery but on the only access road to it. These individuals held a 12-15 foot long inflated rat balloon approximately 40 feet in the air.

ACTION

We conclude that the Union's entire course of conduct constituted confrontational conduct tantamount to picketing and violative of Section 8(b)(4)(ii).

Traditional union picketing involves individuals patrolling while carrying placards attached to sticks. However, the Board has long held that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding union conduct to be the equivalent of picketing.[1] On the other hand, the Board has also 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.'"[2] Along the same

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[1] See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

lines, "[t]he important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."[3]

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.'"[4] Picketing is meant to cause those approaching the location of the demonstration to take some sympathetic action, such as not entering the facility involved. The Board has also recognized that the "conduct element" in picketing invokes a response regardless of any message.

In determining whether employees are engaged in DeBartolo handbilling or picketing, the Board looks to whether, under the totality of the circumstances, a union is using conduct rather than speech to induce a sympathetic response. For example, because of its confrontational and coercive nature, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute picketing.[5] The

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[2] Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

[3] Stoltze Land & Lumber Co., above, 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

[4] See DeBartolo II, above, 485 U.S. at 580, quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

[5] 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); Service & Maintenance Employees Union No. 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for

photographing of neutrals as they pass through an entrance has also been found to be an indicium of picketing in circumstances where it is found to be coercive.[6] The Board has even found that signs placed in proximity to the entrance may constitute picketing under certain circumstances.[7]

In Brandon Regional Hospital,[8] the union had an area standards dispute with a temporary staffing agency supplying construction workers to a construction project at the neutral employer's hospital facility. The union deployed a large inflated rat, a well-known symbol of a labor dispute, accompanied by union handbillers who distributed leaflets which described the union's area standards dispute with the primary employer. However, the union failed to identify itself as the representative of building trade employees, rather than employer's hospital workers, and deployed the rat away from the construction site entrances and close to the neutral employer's main

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handbilling or publicity purposes)"); Truax-Traer Coal Co., above, 177 NLRB at 218 (finding picketing where approximately 200 union agents arrived at the worksite and congregated around or in their parked cars).

[6] See General Service Employees Union Local 73 (Andy Frain), 239 NLRB 295, 306, 307 (1978) (finding union's handbilling was picketing that violated 8(b)(4)(i) and (ii)(B) where union distributed handbills, displayed signs in parked cars, photographed neutrals, and previously picketed facility; finding union's photographing under circumstances inherently coercive where it took place at reserved neutral gate and where cameras had no film).

[7] See, e.g., Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963)(finding picketing that violated 8(b)(7)(B) where the union stuck two picket signs, which were monitored by union agents from a nearby car, in a snow bank in front of the employer's facility after the union had engaged in three months of traditional picketing at the facility); see also Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987) (union signs were placed at or near one or more of the entrances to common situs so that they could be read by anyone approaching them); Construction & General Laborers Local 304 (Athejen Corp.), 260 NLRB 1311, 1319 (1982) (union placed signs on safety cones, barricades, and on jobsite fence).

[8] Sheet Metal Workers, Local 15 (Brandon Regional Hospital), Case 12-CC-1258, Advice Memorandum dated April 4, 2003.

entrance. We found the union's conduct amounted to confrontational picketing.

We first noted that the union's conduct was not pure speech as defined in DeBartolo II, but rather a kind of "mixture of conduct and communication." We then noted that by placing the rat away from the construction site entrances and near the employer's main entrance, without any explanation, the union knowingly gave consumers the false impression that the neutral employer was the "rat" employer. We concluded that the totality of these circumstances established that the union was attempting to use conduct, rather than speech, to induce a sympathetic response.[9]

Similarly, here, the totality of the Union's actions demonstrates that the Union was using conduct, not just speech, to evoke a sympathetic response. The number of demonstrators in the lobby far exceeded the number of people necessary to convey the Union's message, and thus involved an element of conduct beyond pure DeBartolo-protected speech. In addition, the messages on the tee shirts could have created the false impression that the Union had a primary dispute with ABI, i.e., that the Union was protesting the outsourcing of brewery jobs. Furthermore, the billboard being pulled up and down the parking lot aisles (which also contained a misleading message) simulated the kind of patrolling used in a traditional picket line (and, at rest, constituted a posting of a picket-like sign at the entrance to the facility).[10] Finally, the rat stationed at the only vehicular entrance to the facility sent a message that there was a labor dispute with this employer and that the public should stay away. Under all these circumstances, we conclude that the Union was engaged in confrontational conduct tantamount to picketing of a neutral employer.

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[9] See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), *enfd*. 402 F.2d 452 (10th Cir. 1968), citing Carpenters Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965). See also Service Employees Local 87 (Trinity Maintenance), above, 312 NLRB at 743.

[10] Compare International Longshoremen's Assoc. (Disney Cruise Line), 12-CC-1269, Advice Memorandum dated January 13, 2004 (finding no conduct tantamount to picketing where union truck pulled a trailer holding large rat caricature along public highways that led to other businesses as well as to Disney World entrances, stopped only at stop signs and in parking lots of non-Disney businesses, and displayed signs truthfully describing the nature of the primary dispute).

Accordingly, the Region should issue a Section 8(b)(4)(ii) complaint, absent withdrawal, and, in the absence of the appropriate assurances from the Union, should issue a Section 10(l) petition.

B.J.K.