

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

Advice Memorandum

DATE: January 21, 2004

TO : Celeste J. Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel 578-2025-6700
Division of Advice 578-2025-6775
578-8075-2050

SUBJECT: UNITE (Hennes & Mauritz d/b/a H & M) 578-8075-8050-
Cases 2-CP-1040; 5-CP-174; 22-CP-435 5675

These cases were submitted for advice to determine whether the Union violated Section 8(b)(7)(C) of the Act by picketing in excess of 30 days at the Employer's warehouses and its various retail stores with a recognitional and/or organizational object, without filing a timely election petition. We agree with the Region that the Union's picketing is for a proscribed object, that the picketing is not protected by the second proviso to Section 8(b)(7)(C), and that the organizational/recognitional picketing continued in excess of the statutory thirty day maximum. Accordingly, complaint should issue absent settlement [FOIA Exemption 5

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FACTS

The Employer is a clothing and cosmetics retailer that operates 901 stores located in 18 countries. The parent company is located in Sweden, owns no factories and has 21 production offices around the world.

In the U.S., the Employer operates 66 stores in the northeast, including several stores in New York City and at least one in Washington, D.C., Chicago and Philadelphia. The Employer also maintains a warehouse distribution center at two locations in Secaucus, New Jersey, and one in Cheshire, Connecticut.

UNITE (the Union) began demonstrations at the Employer's Secaucus warehouse locations in mid-July 2003,¹ which included leafleting and the use of picket signs. The Union concedes that employees and its own union organizers attended the very first demonstrations, and that they were carrying signs. Thereafter, the Union intermittently engaged in similar demonstrations, about twice a week, at

¹ All dates are in 2003.

those locations through the end of November. The Union admits that it has the long-range goal of organizing the employees at the warehouses.

By letter dated August 5, Union president Bruce Raynor wrote the Employer's Chairman, Stefan Persson, whose office is located in Sweden. Raynor stated that employees at the company's main distribution center in the U.S. were organizing with UNITE and he complained that local management had begun an anti-union campaign. Raynor requested "H&M immediately adopt a policy of neutrality in union campaigns in the U.S., and agree to a mutually satisfactory process for voluntarily recognizing the union when a majority of employees show their interest in union representation." Raynor added that UNITE would "accommodate any discussions necessary to rapidly come to agreement on a positive way to effectuate the right to collective bargaining of H&M employees in the U.S."

The Employer has never agreed to the Union's request for a neutrality agreement. On August 13, employees at the Secaucus distribution center signed a petition demanding, in part, that the Employer agree to the "process of their choosing by which their union would be recognized."² By letter dated August 14, Susanna Lindberg, the Employer's president of North American operations, returned the petition to the employee who presented it to the company and informed her that H & M would not recognize a union without a certified NLRB election.

On September 4, the parties met at the Employer's Manhattan offices. In attendance for the Union were Raynor and campaign director Steve Weingarten. Appearing for the Employer were Lindberg and CFO Peter Scaramelli. According to both Employer witnesses, Raynor asked that the company voluntarily recognize UNITE. The Union has denied making a request for recognition, maintaining instead that Raynor and Weingarten discussed reaching a procedure by which the Union could obtain voluntary recognition.

[FOIA Exemptions 6 and 7(c)], the Union representatives stated that they wanted "[the Employer] to recognize them as the employees' collective-bargaining representative," and suggested that this could be done on a store-by-store basis.³ [FOIA Exemptions 6 and 7(c)] the parties then

² The letter did not contain letterhead from UNITE nor did any UNITE official sign it. There is no evidence as how signatures on this petition were obtained.

³ Lindberg was subsequently specifically asked whether the Union had suggested any particular bargaining units or

proceeded to discuss terms typically found in a neutrality agreement. In this regard, Raynor asked for access onto H & M's property to talk to employees and wanted H&M to agree not to campaign against UNITE. Scaramelli responded that the Employer would not recognize the Union without a Board election.

On December 8, principals of the Union and the Employer met in Sweden but did not reach any agreement. In the interim, the Union engaged in a series of at least 18-20 demonstrations at Employer retail stores in New York City, Washington, Chicago, and Philadelphia, including several mass demonstrations ranging from hundreds to a thousand demonstrators. At these demonstrations, the Union passed out literature, sometimes carried picket signs, and on occasion broadcast its message over bullhorns. The literature passed out by the Union at the stores generally detailed poor labor policies either practiced by H&M or practiced by foreign contractors on behalf of H&M. Generally, the messages contained on the handbills did not refer to a specific Employer retail store or other facility. The picket signs contained generic phrases like, "Abuse is in Style at H&M," "H&M Stinks," "H&M Exploits Workers," while others simply bore the UNITE logo.

At seven of the approximately 18-20 demonstrations at retail stores between September 12 and December 18, picket signs were used. Descriptions of those seven demonstrations, as well as an eighth demonstration in New York on October 24 not involving actual picket signs, are as follows:

On September 12, approximately 150 Union supporters arrived by bus at one of the Employer's Chicago stores. Fifteen or so of the Union supporters joined the line of people waiting to enter the store while others gathered outside and passed out leaflets. One person used a bullhorn to lead chants protesting the alleged unfair treatment of employees and the Employer's use of sweatshops overseas. When the fifteen Union supporters entered the store, they opened their outer garments, revealing their red Union tee shirts and proceeded to initiate conversations with many of the customers in the store. Outside the store, several of the Union supporters carried picket signs stating "Abuse Is In Style at H&M." Union representative Weingarten allegedly stated, by bullhorn, that the employees wanted UNITE to represent them, but that the Employer was preventing that

store-by-store units, but she did not recall any discussion of this.

from happening and questioned why anyone would shop at a place that mistreats and abuses its staff.⁴

Following this demonstration, on October 24, the Union engaged in two other similar mass demonstrations at stores in Washington and New York City. The demonstration in Washington, similar to the earlier Chicago demonstration, involved the use of identical picket signs, with the addition of an inflatable skunk and a picket sign bearing the legend, "H&M stinks". The October 24th New York demonstration was attended by approximately 200 demonstrators, a disc jockey played music over a loudspeaker, and demonstrators repeatedly chanted slogans while speakers accused H&M of running sweatshops. However, this demonstration was apparently devoid of picket signs.

Five other demonstrations, occurring on separate dates in Washington (October 31), New York (November 11, 21, and 24) and Philadelphia (December 18), all involved the use of picket signs similar to the ones noted above. Additional relevant conduct occurring at these demonstrations included costumed handbillers entering the Washington store, a mass rally of 1,000 demonstrators at a New York store on November 21, and the blocking of entrances to a New York Store on November 11 to the Philadelphia store on December 18.

ACTION

We agree with the Region that the Union's conduct constituted picketing for a proscribed object under Section 8(b)(7)(C), that the picketing was not protected by the second proviso to that Section, and that the recognitional and/or organizational picketing continued over a time period which exceeded thirty days, without an election petition being filed. Therefore, complaint should issue, absent settlement, [FOIA Exemption 5] and Section 10(1) injunction proceedings should be instituted, if necessary.

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

⁴ Union counsel has denied Weingarten made such statements.

⁵ See e.g., New Otani Hotel and Garden, 331 NLRB 1078, 1080 n.6 (2000); Chefs, Cooks Local 89 (Cafe Renaissance), 154 NLRB 192 (1965); Int'l Typographers (Greenfield Printing), 137 NLRB 363, 372-374 (1962), enfd. 326 F.2d 634 (D.C. Cir. 1963).

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

violates Section 8(b)(7)(C) when from its commencement it is conducted without an election petition being filed within a reasonable period of time 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 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 picketing.⁸

We first conclude that the Employer has an organizational object with regard to both the warehouse and retail store employees. As to the warehouse employees alone, the Union conceded the organizational object from the first day of picketing in mid-July. That organizational object was reiterated in Union's August 5th letter to the Employer, stating that employees at the main distribution center were organizing with UNITE. With regard to both sets of employees, the same August 5 letter expressed an organizational interest in "H&M employees in the U.S." and went on to request that "H&M immediately adopt a policy of neutrality in union campaigns in the U.S., and agree to a mutually satisfactory process for voluntarily recognizing the union when a majority of employees show their interest in union representation." Thus, it is clear that "an" object of the Union conduct was obtaining a signed neutrality/card check agreement from the Employer, in order to assist the Union in its effort to organize the Employer's employees.⁹ The terms of that agreement discussed at the September 4th meeting, requiring the Employer to grant the Union access to its facilities for the express purpose of organizing its employees, and a pledge by the Employer that it would not campaign against the Union, all evince that organizational object.

Finally, with regard to the retail employees, the Employer reports that in demonstrations in Chicago and New

⁷ See, e.g., Iron Workers Local 10 (R & T Steel Constructors, Inc.), 194 NLRB 971, 973 (1972).

⁸ St. Helens Shop 'N Kart, 311 NLRB 1281, 1286 (1993), citing to Stage Employees IATSE Local 15 (Albatross Productions), 275 NLRB 744-745 (1985), and the cases cited there at n.4.

⁹ See New Otani Hotel and Garden, 331 NLRB at 1080 ("undisputed" that union's campaign, which primarily relied upon picketing for a neutrality/card check agreement, had "an overall organizational objective").

York, Union agents exhorted employees to join the Union, and in New York, employees were asked to provide contact information to the Union, presumably in order to facilitate the Union's organizing campaign. Those requests also show an organizational object.

We further conclude that the Union's conduct also had a recognitional object. Thus, at the September 4th meeting, the Union specifically requested that the Employer grant it voluntary recognition with regard to the warehouse and the retail store employees. It is, therefore, clear that the Union's conduct also had recognition as "an object." Moreover, even assuming, as the Union urges, that its September 4th request for "voluntary recognition" was merely a request that the Employer agree to a neutrality/card check process, such a request also constitutes a proscribed recognitional object. While the agreement urged by the Union would not require immediate recognition, it is apparent, as noted in the Union's August 5th letter, that such an agreement would require that the Employer give up its right to an election¹⁰ and recognize the Union once it was presented with a verified card majority. Such an ultimate recognitional object is proscribed by Section 8(b)(7)(C).

Thus, contrary to the Union's assertions, an immediate recognitional demand is not necessary for a violation of Section 8(b)(7)(C). For instance, when a non-certified union pickets in excess of thirty days without filing an election petition, and that picketing is in support of interim objectives such as requiring an employer to make offers of reinstatement to employees, which offers, if accepted, would result in majority union status and thus a bargaining obligation, the Board may consider that picketing recognitional in violation of Section 8(b)(7)(C).¹¹ Moreover, in New Otani Hotel, a representation case, the Board left open the issue of whether picketing for a

¹⁰ Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974) (employer not required to recognize union based on card majority).

¹¹ See HERE Local 737 (Jets Services), 231 NLRB 1049, 1053 (1977) (picketing violated Section 8(b)(7)(C) in large part because the picketing for mass reinstatement, if successful, would have reestablished the prior majority status of the union thereby creating a bargaining obligation); Retail Clerks Local 1557 (Giant Foods of Chattanooga), 217 NLRB 4, 10 (1975) (8(b)(7)(C) violation found where union's protest of successor's alleged discriminatory refusal to hire certain employees was inseparable from enforcing successor's alleged bargaining violation).

neutrality/card check agreement, where the object is ultimately recognitional, would violate Section 8(b)(7).¹²

Here, if the Union were ultimately successful in its organizing drive, the Employer would be required by the agreement to recognize the Union. In these circumstances, we conclude that the Union's conduct also had an object of requiring the Employer to recognize it as the representative of both its warehouse employees and its retail employees.

Given the Union's organizational and recognitional objectives, as shown above, it could not lawfully "picket" the Employer for more than 30 days in the absence of an election petition, unless its picketing were privileged by the second proviso to Section 8(b)(7)(C), i.e., dedicated "...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 ..." Thus, we must next establish whether the Union was engaged in "picketing" to advance its proven organizational and recognitional objects, whether such picketing was protected by the "publicity" proviso, and whether the picketing took place for more than 30 days.

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.¹³ Rather, the essential feature of picketing is the posting of individuals at entrances to a place of work.¹⁴ In addition, the Board has stated that "[o]ne of

¹² 331 NLRB at 1081 (the union's requests that the employer sign a neutrality/card check agreement "do not constitute a present demand for recognition" under Section 9(c)(1)(B)) and at 1080, n.6 (but picketing with an *ultimate* recognitional objective may, in some circumstances, violate Section 8(b)(7) even though it does not seek immediate recognition and therefore would not provide a basis for processing an employer petition under Section 9(c)(1)(B)) (emphases in original). See also Brylane, L.P., 338 NLRB No. 65 (November 20, 2002).

¹³ 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).

¹⁴ Mine Workers District 2 (Jeddo Coal Co.), 334 NLRB 677, 686 (2001); Service Employees Local 87 (Trinity Building

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.'"¹⁵ Thus, because of its confrontational nature, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute picketing.¹⁶

Here, we agree that the Union's conduct occurring between mid-July and November at the Secaucus warehouses, which included the use of picket signs, constituted traditional picketing in support of the recognitional and organizational objects noted above.¹⁷ Similarly, we conclude that seven of the retail store demonstrations occurring between September and December, where picket signs were also utilized, obviously constitute traditional picketing under 8(B)(7)(C). Moreover, we conclude that on the whole, the Union's conduct was confrontational and constituted picketing. Specifically, we conclude that the October 24th New York mass demonstration involving chanting

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)).

¹⁵ Chicago Typographical Union 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

¹⁶ 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).

¹⁷ The witness statements regarding the warehouse demonstrations do not reveal whether those carrying the picket signs were involved in patrolling; nonetheless, the presence of the signs is sufficient. See, e.g., Painters District Council 9 (We're Associates), 329 NLRB 140, 142 (1999)(the mere gathering of demonstrators around a picket sign alone enough to find picketing; classic "patrolling" is unnecessary).

and music broadcast through loudspeakers was sufficiently confrontational, even in the absence of picket signs, to constitute picketing under Section 8(b)(7)(C). In addition, the incidents of costumed handbillers invading a Washington store on October 31, the mass rally of 1,000 demonstrators at a New York store on November 21, and the blocking of entrances to the New York store on November 11 and the Philadelphia store on December 18 all reinforce the finding of picketing in those incidents where picket signs were in use.

We further agree with the Region that this picketing was not protected by the second "publicity" proviso to 8(b)(7)(C). The second proviso to Section 8(b)(7)(C) immunizes even picketing with a recognitional or organizational object carried on in excess of 30 days, where the union's message is limited to advising the public that the employer does not have a contract with the union or does not employ its members, and where it does not have the effect of causing a work stoppage or interference with the delivery of goods or services. Here, the picket signs in use at the retail store demonstrations, i.e., "H&M Stinks" "H&M Exploits Workers" or "Abuse is in style at H&M" do not comport with the proviso language, nor do they even imply such a message.¹⁸ The Board has held that such signs that posit general complaints without setting forth the information prescribed in the proviso are not protected.¹⁹

¹⁸ The signs in use at the warehouse demonstrations translated from the Spanish, "We are humans, not mules," "When do we want our Union?-Now" "Yes we can," and "Unite", do not track the proviso language, but more importantly they are directed to the warehouse employees and therefore would not conform to that part of the proviso which requires that the message be limited to "advising the public." In that regard, the demonstrations were timed to start with the beginning of each shift, and were carried on in the employee parking lots.

¹⁹ In Electric Workers, IBEW, Local 113 (I.C.G. Electric), 142 NLRB 1418, 1419 (1963), the Board found that picket signs stating that employees' working conditions were "substandard" did not fall within the shield of the proviso. Similarly, in Local 275, Laborers International Union (S. B. Apartments), 209 NLRB 279, 284 (1974), the Board held that a picket sign stating that "Workers on this job ... do not receive wages and working conditions as good as Local 275" constituted area standards picketing unprotected by the proviso.

As a final matter, it is well established that picketing for a proscribed object that does not comply with the statute's second proviso and that continues for a period of more than 30 days is unlawful, "regardless of its sporadic character within that time period."²⁰ Here, the proscribed organizational and recognitional objects are national in scope. That is, this has been a national campaign from its inception, as evidenced by the Union's August 5th letter regarding the collective bargaining rights of "H&M employees in the U.S." The parties' September 4th discussions make it clear that UNITE was attempting to organize all of H&M's employees by negotiating a neutrality agreement. Moreover, the evidence of "generic" picketing conducted at the retail stores which did not exclude the warehouse campaign²¹ leads to the conclusion that the picketing for more than 30 days at the retail stores was unlawful as a continuation of the warehouse picketing.²² Thus, the Region should first argue that the organizational/recognitional picketing which began at the warehouse locations in mid-July and which continued at those locations on a twice weekly basis into November, together with the eight incidents of picketing at the retail stores which began in September and continued until December, far exceeded the thirty day statutory limit. The Region should also argue that if there is any reason to examine the picketing separately at the warehouse and at the retail stores, the picketing at each exceeded the 30-day

²⁰ 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)).

²¹ Indeed, one flyer passed out at a Chicago demonstration specifically mentioned the warehouse campaign and concluded with "Join us in building a Union at H&M-Contact UNITE."

²² See, Retail Clerks Store Employees Union Local 1407, 215 NLRB 410, 412 (1974) ("We do not ignore [the 30-day limitation on picketing contained in 8(b)(7)(C)] simply because a single question concerning representation ranges over a series of geographical locations.")

limitation. Thus, the twice-weekly warehouse picketing between mid-July and November, and the eight incidents of picketing at the retail stores between September and December, individually exceed the 30-day statutory limitation.

In sum, the Region should issue complaint, absent settlement, alleging that the Union violated 8(b)(7)(C) by picketing the Employer for more than the thirty-day statutory limit at its warehouse and retail outlets with the object of organizing all of its employees and being recognized as the representative of those employees. The Union should be ordered to cease and desist from picketing for a recognitional or organizational object at all H&M facilities located in the United States. [*FOIA Exemption 5*

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B.J.K.