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

Advice Memorandum

DATE: January 16, 2004

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: SpeedImpex
Case 4-CA-32354 220-2587-0000
220-2550-9000
512-5009-6733
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This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by petitioning to enjoin the Union from following independent contractor drivers.

We conclude that the Employer's lawsuit does not violate Section 8(a)(1) because the injunction sought and obtained, in context, bars conduct that is not covered by the Act.

FACTS

Prior to March 2003,[1] the New York Times contracted with Brauninger News to distribute its newspapers in the greater Philadelphia area. Brauninger drivers were represented by Teamsters Local 628 (the Union). Since March, the New York Times has contracted with SpeedImpex (the Employer) to distribute the newspaper in and around Philadelphia. The Employer uses independent contractors (drivers) to perform these delivery services.

From about 1:00 a.m. to 5:00 a.m. on March 31, the Union picketed the Employer's Philadelphia warehouse. Later that day, the New York Times went to state court to enjoin the picketing. The Union stipulated to a court order that enjoined the Union from preventing the New York Times from delivering its newspapers to any facility "by blocking ingress to and egress from any [such] facility . . . by violence or intimidation, seizure, conversion or coercion or any threats thereof." There is no evidence that the Union engaged in picketing or any other activities against the New York Times or the Employer between March 31 and mid-May.

At approximately 2:30 a.m. on May 22, a group of Union members, many of them wearing Union jackets, gathered

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[1] All dates are in 2003 unless otherwise noted.

immediately outside the Employer's facility. The Union members were not picketing. Rather they appeared to be "observing" activities at the Employer's facility and noting the license numbers of vehicles as they entered and exited the Employer's warehouse. The Employer called the police, asserting that the Union members were on the Employer's property in violation of the March injunction. The police did not cite any member of the group, but persuaded the group to move across the street.

Over the next two months, groups of Union agents gathered outside the Employer's facility at least nine more times, apparently to engage in similar "observing" activities.[2] In addition to the Union's "observing" activities, Union agents followed some of the independent drivers after they left the Employer's warehouse;[3] some drivers stated that Union agents followed them on more than one occasion.

In response to the Union's "observing" and following activities, the Employer filed suit in the Court of Common Pleas for the Commonwealth of Pennsylvania alleging that the Union violated the March 31, 2003 joint consent order, and also "violated the criminal and civil laws of the Commonwealth of Pennsylvania." Among the nine causes of action alleged by the Employer were tortious interference with business relationships, civil conspiracy, defiant trespass, harassment, and stalking. The Employer sought a broad court order that would prohibit the Union from "following or attempting to follow any driver leaving any SpeedImpex facility located within the Commonwealth of Pennsylvania or following or attempting to follow any driver delivering goods from SpeedImpex at any time during the drivers' delivery routes, anywhere within the Commonwealth of Pennsylvania[.]"

In support of the Employer's petition for an injunction, some of the drivers provided declarations stating that unidentified Union agents followed them on numerous occasions in the early morning hours as they attempted to make their normal deliveries. The drivers stated that Union agents, <u>inter alia</u>, followed them closely at times, apparently running red lights and disobeying

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[2] The Employer contacted local police several times in response to the Union's activities. The police did not cite any Union members for their conduct, but persuaded the group to move further from the warehouse.

[3] A Union witness testified that Union agents "only . . . followed about maybe a third of the routes."

posted "no turn on red" signs, and also watched and waited for drivers as they made deliveries. At least one driver reported that Union agents continued to follow him after the agents were contacted by local police officers.

Some drivers claimed that the Union agents' following activities made them "fearful for their safety" and "apprehensive." Some drivers claimed that, to escape the Union agents, they were forced to drive at excessive speeds, to spend several minutes making unnecessary U-turns, to take circuitous detours through residential neighborhoods, or otherwise to deviate from their normal routes. One driver stated that the Union's activities caused him to limit his deliveries to convenience stores in "heavily traveled, well-lit locations." Another driver stated that he aborted approximately two thirds of his deliveries one evening in order to lose Union agents following him.

The court conducted a hearing on July 29. At that hearing, the Employer and the Union described the Union's "observing" and following activities, and the Union asserted that its conduct was related to a nascent area standards campaign. However, Union witnesses testified that their observing and following had only disclosed the "approximate number of vehicles that left the [Employer's] facility with papers," and that following drivers would disclose "who the customers that they're delivering to are so that [the Union] can go out to those people and . . . tell them what's going on." The Union witnesses testified that observing and following drivers did not produce any information regarding what the Employer paid the drivers.

In denying most of the Employer's requests for relief, the court found that the Union had not used physical force, nor committed specific acts of coercion, used abusive language, or blocked drivers. However, the court found that "the testimony and the credible evidence [established] that [the Union's following] activity could or certainly would have the potential of causing harm to the community, especially given the testimony as to the speed which one or both [drivers] utilized in attempting to avoid being followed." Thus, in the absence of some credible justification from the Union, the court found that the Union's following drivers was not "a legitimate activity. While it is not directly intimidating, it can certainly be viewed as intimidating."

Based on its findings, the court issued an order that restrains and prohibits the Union from "following or attempting to follow any driver, independent contractor or otherwise, leaving the SpeedImpex facility or attempting to follow that driver as he approaches the exit to make

deliveries. Th[e] Order . . . encompass[es] the entire route of the driver anywhere within the Commonwealth of Pennsylvania[.]" The Union has appealed the injunction, asserting, inter alia, that the Union's following of drivers is activity protected by Section 7 of the Act.

ACTION

We conclude that the Employer's suit to enjoin the Union's following and observing activities does not violate Section 8(a)(1). The gravaman of the lawsuit does not attack any conduct that is covered by the Act, nor is there evidence sufficient to establish that the Employer sought an order that would prevent the Union from engaging in any future conduct that would be covered by the Act. The Region should dismiss the charge, absent withdrawal.

An employer violates Section 8(a)(1) by filing and prosecuting a baseless lawsuit in retaliation for conduct protected by the Act.[4] The Union claims that its observing and following activities are covered by the Act because they are designed to gather information that might support a potential area standards campaign regarding the Employer's use of independent contractors. The Union contends that the Employer's lawsuit is unlawful because it attacks that conduct. The Union, however, has not produced any evidence establishing that the Union's conduct supports a valid area standards campaign.

Union agents all but conceded at the July 29 hearing that their observing and following tactics have been completely ineffective in eliciting any information to support an area standards campaign. Indeed, Union agents were unable to articulate how their activities might assist them in gathering the kind of data they claimed to be after. Union agents admit that their "observing" and following of drivers has produced no information regarding what the Employer pays its drivers. Union agents followed drivers on at least ten occasions over two months, but did not contact any driver to inquire whether the Employer was meeting the purported area standards.[5] Regardless, even if the Union could proffer some evidence that its "observing"

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[4] See, e.g., BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002); Bill Johnson's Restaurants, Inc. v. NLRB, 461 NLRB U.S. 731 (1983); Petrochem Insulation, Inc., 330 NLRB 47, 51 (1999).

[5] Nor has the Union explained how merely following drivers could provide the Union with any information regarding what the Employer pays drivers to deliver newspapers.

and following activities were necessary to gather area standards information, the Union's conduct of speeding, intimidating drivers, or otherwise threatening the safety of the community does not constitute protected activity. Given the Union's inability to establish an area standards purpose for its conduct, we conclude that the Union's purported area standards purpose for following drivers is false.

Given our rejection of the Union's purpose for following drivers, we can infer that Union agents followed drivers for another purpose, i.e., to harass and intimidate them.[6] This inference is buttressed by the fact that the court reached the same conclusion. The court first found that the Union's observing and following conduct was not "a legitimate activity", and then found that the Union's conduct "can certainly be viewed as intimidating." Such conduct is not covered by the Act. Thus, the Employer's lawsuit did not unlawfully attack conduct covered by the Act.

We considered and rejected the Union's further argument that the Employer's lawsuit violates Section 8(a)(1) because it sought an over broad injunction that would restrict all following by the Union, including bona fide information gathering or other protected activity. Although we concede that the order is broadly worded,[7] in the circumstances presented here, we would not argue that the Employer violated the Act solely by seeking such an order.

The Employer brought its lawsuit in response to the Union's persistent, unsafe, and apparently unjustified following of drivers. In eliciting testimony from Union agents and independent contractors, the Employer established that the Union's activities were not designed to further its purported goal of gathering information, or any other legitimate purpose. The court agreed, specifically noting the Union's disregard for the community's safety and its failure to justify its conduct. Thus, gleaning the meaning

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[6] See, e.g., Building Service Employees Union, Local 87, 223 NLRB 30, 34 (1976) (union's avowed area standards object found pretextual, allowing Board to infer another, unlawful object).

[7] For example, the order could be read to prohibit even following that is directly related to protected activity, such as ambulatory picketing. We do not pass on whether following independent contractors and picketing the Employer at its customers' facilities would constitute lawful ambulatory picketing.

of the order from the conduct that gave rise to it supports the conclusion that the order sought by the Employer, as well as the order issued by the court, was intended to prohibit the Union's unprotected conduct.[8]

There is also no evidence that the Employer or anyone else has attempted to enforce the order to prohibit protected activity. Moreover, the Union failed to address the potential over breadth of the order during the underlying litigation, nor has the Union asked the court for a clarification, modification, or construction of the order to determine whether the court intended to prohibit protected activity.[9] Thus, the general wording of the order notwithstanding, we would not argue that the Employer sought and obtained an unlawfully, overbroad injunction.

In sum, the Region should dismiss the charge, absent withdrawal; the Employer's suit is lawful, as it does not seek to enjoin any Union conduct that is covered by the Act.

B.J.K.

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[8] See, e.g., United States v. Greyhound Corp., 508 F.2d 529, 531 (7th Cir. 1974) (court orders should be viewed in the context of the entire background behind the order, "including the conduct that the order was meant to enjoin or secure, the interests it was trying to protect, the manner in which it was trying to protect them . . .").

[9] See, e.g., McComb v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949) (respondent's record of continuing and persistent violations warranted a broad, generally worded order, but respondent was free to petition the district court for a modification, clarification, or construction of the order if there were extenuating circumstances or if the decree became too burdensome).