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UNITED STATES GOVERNMENT  
National Labor Relations Board

RELEASE

506-2017  
593-4001  
712-5042  
712-5056

# Memorandum

TO : William C. Humphrey, Director, Region 5

DATE: January 31, 1979

FROM : Harold J. Datz, Associate General Counsel,  
Division of Advice

SUBJECT: Daniel Mitnick d/b/a The Management Company t/a TMC  
Cases 5-CA-9898; 10284

These cases were submitted for advice on the issues of: (1) whether the Union violated Section 8(g) by failing to disavow involvement in picketing engaged in at a health care facility; (2) whether the group of picketers themselves constituted a labor organization for purposes of Section 8(g); and (3) whether the Employer violated 8(a)(1) and (3) by refusing to recall from layoff one employee who engaged in handbilling and two other employees who engaged in picketing.

### FACTS

Federal Hill Nursing Center, Inc. is a nursing home facility engaged in patient care. Since it came under new ownership in January, 1978, Federal Hill subcontracted all dietary, laundry, and housekeeping functions to TMC. 1/ Both Federal Hill and TMC have collective bargaining relationships with the District 1199E (the Union), but neither has been able to come to agreement for a new contract with the Union.

In May, TMC (the Employer) announced to the Union its intention to lay off many of its workers and expressed its willingness to bargain over the effects of the layoffs. By agreement of the parties, the Employer on June 2 delivered to the Union a list of the employees to be laid off, effective June 6. Included among the laid-off employees were the three employees who engaged in the activities discussed below.

Commencing at approximately 11:30 a.m., on Monday, June 5, a picket line was established in front of Federal Hill. Two of the laid off employees, the subjects of the charge in Case 5-CA-10284, were part of a group of approximately seven individuals who engaged in picketing activity on that day. 2/ The remaining five persons were nonemployees of either Federal Hill

1/ All dates are in 1978.

2/ The two picketing employees, who are the subjects of the 8(a)(3) charges in Case 5-CA-10284, were the individual Charged Parties in Cases 5-CG-17, 18, 19, 20. In an Advice Memorandum dated August 8, 1978, it was concluded that the July picketing of Federal Hill violated 8(g). Since

(Continued next page)



TMC

Cases 5-CA-9898; 10284

or TMC. The pickets passed out handbills and spoke with the public and with employees of Federal Hill and TMC as they entered or left the facility. There was, however, no attempt to prevent any employees from reporting to work or to prevent the performance of any service to the facility. The signs the pickets carried read:

"GERSHOWITZ SAYS 'LET PATIENTS EAT BEANS'"

"BACK TO NON-UNION, AIN'T NO WAY, 1199 IS HERE TO STAY"

"DADDY DON'T GET NO MORE PAY, UNEMPLOYMENT WE'RE ON  
OUR WAY"

"QUALITY HEALTH CARE IS OUR RIGHT, WORKERS AND PATIENTS  
UNITE TO FIGHT"

"SHE CUT OUR BENEFITS, SPED US UP, LAID US OFF, ALL FOR  
A BUCK"

In addition, one of the handbills distributed by the pickets on June 5 stated that Gershowitz, the owner of Federal Hill, "refused to sit down and negotiate a contract with our Union, 1199E" and solicited the employees and members of the public to "Help 1199E in their struggle for better patient care and decent wages and benefits." Also, on June 5, a press release was given by the two laid-off employee picketers to local television stations which publicized the activity at the facility. In the press release, a description was given of District 1199E's struggle with Gershowitz at Federal Hill and other facilities. The press release also carried a list of demands from the "workers and union members", which, inter alia, asked that Gershowitz present a written contract proposal and bargain in good faith for a fair union contract. The press release stated that it was put out by the Nursing Home Action Coalition (hereinafter the Coalition), a group ostensibly composed of concerned citizens and laid-off employees concerned about the quality of nursing home care.

On June 6, only the two laid-off employees were present in front of the facility talking to employees as they entered or left. They carried no picket signs. On June 7 there was no picketing. On June 8, the two laid off employees distributed a notice of "important meetings for all Federal Hill" employees. The notice advertised three meetings, one for each shift during the employees' off time, to discuss the "fight with Gershowitz since the

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2/ (Continued) these two employees took part in the July picketing, it is clear that they lost their employee status at least as of July 6, when the picketing commenced. However, for backpay purposes, it is necessary to determine whether the June picketing also violated 8(g).

TMC

Cases 5-CA-9898; 10284

latest layoffs and the victorious picket line and press conference last Monday (June 5)." Two of the meetings were to be held at a library located next to the facility and the third at the Union hall (District 1199E). 3/ The notice was from the Federal Hill Workers Shop Committee. This was the label attached to District 1199E's negotiating committee with Federal Hill and TMC, of which the two picketers were members.

In Case 5-CA-9898, the Charging Party's participation in the activity occurred only on June 10, 1978, when she solicited signatures on a petition to have the Baltimore City Health Department conduct an investigation of conditions within the nursing facility. The Charging Party was one of approximately eight individuals 4/ who solicited the public to sign petition forms. The solicitation took place within a block of the nursing home where the two other laid-off employees were again picketing the facility. 5/

No notice was given for any of the picketing which took place in June. Picketing authorized by the Union began in July after an 8(g) notice, albeit an insufficient one, was sent to Federal Hill. The July picketing and the notice were the subject of an Advice Memorandum dated August 8, a copy of which is attached.

The Employer began recalling employees from the layoff in or about mid-June, 1978. According to the Employer, had she not been engaged in the conduct of June 10, 1978, the Charging Party in Case 5-CA-9898 would have been recalled on June 24, 1978. Likewise, one of the two laid-off employees in Case 5-CA-10284 would have been recalled on June 29, had he not engaged in the picketing. 6/

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3/ According to the laid-off picketers, they did not request the Union's permission to hold this meeting at the Union hall prior to the distribution of the notice. In any event, no meeting was held at the hall because the Union informed them that it could not be held there.

4/ The remaining seven were nonemployees of either Federal Hill or TMC.

5/ The language on the signs was the same as that used in the June 5 picketing. However, there is some indication that an additional sign contained language regarding a city health department inspection of the nursing home facility.

6/ The other employee in Case 5-CA-10284 ranked number 10 or 11 in seniority in his department and would not have been recalled in any event since only 9 of 13 employees were recalled. Moreover, even if the Employer had decided to recall more than 9 employees, this employee would clearly not have been recalled until August, and he had already lost his employee status by engaging in the July picketing.

TMC

Case 5-CA-9898; 10284

ACTION

As to the charges in Case 5-CA-10284, it was concluded that, absent withdrawal, the charges should be dismissed on the theory that the two purported discriminatees in this case were engaged in picketing violative of Section 8(g) in June 1978 and, consequently, lost their employee status then.

Initially, it was noted that the work stoppage and picketing in June at Federal Hill without prior notice was violative of 8(g) only if it was engaged in by a labor organization and not just by employees acting merely as private individuals. <sup>7/</sup> However, if these employees were creating the impression in the minds of the other employees and the public that they were acting on behalf of the Union and the Union was aware of this conduct, violation of 8(g) could be charged against the Union since the Union failed to disavow the conduct.

Since Sunset Line and Twine, <sup>8/</sup> the Board has consistently applied the ordinary laws of agency to determine whether an individual can be considered the agent of another individual or organization. Accordingly, if an individual can be shown to have even apparent authority, this is sufficient to prove agency. In this case, while the two laid-off employees who did the actual picketing were not officers of District 1199E, they were members of the Union's bargaining committee and thus authorized to act on behalf of the Union in certain matters. While this fact alone is not enough to establish agency, <sup>9/</sup> it may be considered in connection with other factors tending to prove the appearance of agency, which the Union had a duty to dispel. The signs which the picketers carried gave the impression that the instant dispute was between Federal Hill, TMC, and the Union, not between the Employer and the individual pickets. In addition, some of the handbills cited Federal Hill's and TMC's refusal to negotiate with 1199E and solicited the employees to "Help 1199E in their struggle for better patient care and decent wages and benefits." A press release given by the picketers to a local television station also publicized 1199E's struggle with Federal Hill and listed a set of demands which included bargaining in good faith for a fair union contract. Finally, the Committee, of which the employees were a part, the bargaining arm of 1199E, distributed notices of a meeting for all Federal Hill employees to discuss the picketing and the press conference.

<sup>7/</sup> "Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act," Memorandum 74-49, issued by the General Counsel, August 20, 1974, Section III. J. at pp. 16-17. See also Walker Methodist Residence and Health Care Center, 227 NLRB 1630, in which the Board found that a single 30-minute work stoppage by unorganized employees who were protesting working conditions was not violative of Section 8(g) since it did not involve any labor organization. In contrast, in the instant case, the picketing occurred for several days, the employees were represented by a union, and the union was found to be responsible for the picketing (as discussed infra).

<sup>8/</sup> 79 NLRB 1487.

<sup>9/</sup> See, e.g., Int'l Brotherhood of Electrical Workers, Local Union No. 43,

TMC

Case 5-CA-9898; 10284

All these activities tend to show that while there is no direct evidence that District 1199E authorized the action or openly aided the pickets, District 1199E is responsible for the activities at Federal Hill because it failed to disavow any of the above activities. 10/ For example, 1199E made no efforts to inform the employees of Federal Hill or TMC that it had not authorized the picketing, and it did not discipline any of its members for their involvement in the picketing. Neither did the Union make any efforts to inform the public that it was not involved in the concerted activities, even though there had been a press release which could have reasonably created that impression. Instead of attempting to correct any alleged mistaken impressions, the Union took advantage of the publicity engendered by the actions of the laid-off employees and the Coalition. Finally, when the Union did picket in July, it made no efforts to dispel the impression, created by the earlier publicity and the picket signs, that it had authorized, or at least tolerated, the picketing in June. Indeed, when the Union picketed in July, it used the same picket signs that had been used in the June picketing.

Thus, it was concluded that the Union was responsible for the June picketing, which violated 8(g) because no notice was given, and that the June picketing was inextricably intertwined with the picketing which the Union clearly sanctioned and encouraged in July. Consequently, it was concluded that the two employees involved in Case 5-CA-10284 lost their employment status for participating in the June picketing and were thus not entitled to recall in June or at any later date. Accordingly, the 8(a)(3) charges in Case 5-CA-10284 should be dismissed, absent withdrawal. 11/

As to the charges in Case 5-CA-9898, it was concluded that the activity engaged in by the Charging Party on June 10 was not inextricably intertwined with the picketing activity which was taking place across the street, notwithstanding the Employer's mistaken impression to the contrary. Thus, the Charging Party's act of soliciting signatures on the petition

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10/ Brotherhood of Teamsters & Auto Truck Drivers Local No. 85 (San Francisco Newspaper Printing Company, Inc.), 191 NLRB 107.

11/ In view of the fact that the Union has been viewed as responsible for the acts surrounding the picketing of Federal Hill in June, it was considered unnecessary to determine whether the Coalition is actually a labor organization under Section 2(5), particularly considering the paucity of the evidence regarding the Coalition, as well as the fact that the Coalition never demanded that Federal Hill or TMC bargain with it. Instead, the Coalition seemed to urge bargaining with the Union as an important part of its campaign for better nursing home care.

TMC  
Case 5-CA-9898; 10284

would not violate 8(g) and would not result in a loss of employment status. 12/

Case handling  
Ex 2, 5 + 7 (E)

  
H. J. D.

12/ See General Counsel Guidelines, supra, Section III. H. 2 at p. 13 and the cases cited in fn. 45.

13/ See Glendale Convalescent Hospital, Case 30-CA-3620, Advice Memorandum dated August 4, 1976.