

Local 254, Service Employees International Union, AFL-CIO and Women and Infants Hospital and Aid Maintenance Co., Inc. Cases 1-CC-2497, 1-CG-48, and 1-CC-2523

October 15, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

The principal issues in this consolidated case¹ are whether (1) the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing and handbilling a hospital in Rhode Island and a community college in Massachusetts and (2) whether the community college and a cleaning contractor constitute joint employers of employees who perform janitorial services at the college.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, as modified below, and to adopt the recommended Order as modified.³

1. The judge found that the purpose of the Respondent's picketing and handbilling at Women and Infant's hospital, as admitted by Business Agent Victor Lima, was to force the neutral hospital to cease doing business with the primary, Intercity Maintenance. Based on this direct evidence of a prohibited secondary objective, the judge found that the Respondent violated Section 8(b)(4)(ii)(B). *General Teamsters Local 126 (Redi Mixed Concrete)*, 200 NLRB 253, 254-255 (1972); *Teamsters Local 315 (Sante Fe)*, 306 NLRB 616, 631 (1992). We affirm these unfair labor practice findings based on agent Lima's admission. We find it unnecessary to reach the judge's additional reliance on the evidentiary criteria set forth in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950), in finding that the Re-

spondent's picketing of the hospital had an unlawful secondary object.⁴

2. Although we agree with the judge that the Respondent's picketing and handbilling at both the hospital and the college violated Section 8(b)(4)(ii)(B), we disagree with his conclusion that the Respondent also violated Section 8(b)(4)(i)(B) at the hospital. Section 8(b)(4)(i)(B) proscribes inducing or encouraging employees of a secondary employer to strike. *Laborers Local 332 (C.D.G., Inc.)*, 305 NLRB 298, 305 (1991). With respect to the picketing and handbilling at the college, the judge correctly dismissed the 8(b)(4)(i)(B) allegation in the absence of evidence that such conduct was designed to induce or encourage any neutral employer's employees to refuse to work. We find that the same lack of evidence requires dismissal of the 8(b)(4)(i)(B) allegation with respect to the Respondent's picketing and handbilling at the hospital.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 254, Service Employees International Union, AFL-CIO, Boston, Massachusetts, its officers, agents and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(a) and reletter the subsequent paragraph.

“(a) Within 14 days after service by the Region, post at its union office in Boston, Massachusetts copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent in English and Spanish immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

“(b) Within 14 days, sign and return to the Regional Director sufficient copies of the notice in English and Spanish for posting by Women and Infants Hospital and Massachusetts Bay Community College, if willing, at all places where notices to employees are customarily posted.”

3. Substitute the attached notice for that of the administrative law judge.

¹On February 12, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions, a supporting brief, and a brief in support of portions of the judge's decision. Intervenor Massachusetts Bay Community College filed a brief in support of the judge's decision. Both the General Counsel and the Intervenor filed answering briefs to the Respondent's exceptions.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³The General Counsel excepts to the judge's failure to order the Respondent to post a Spanish translation of the notice to employees. We find merit in the exception and shall amend the Order to include this remedy.

⁴Member Higgins would additionally rely on the judge's *Moore Dry Dock* analysis in finding that the Respondent violated Sec. 8(b)(4)(ii)(B) when picketing Women and Infants Hospital.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in any strike, picketing, or other concerted refusal to work at Women and Infants Hospital, or any other health care institution, without notifying, in writing, Women and Infants Hospital, or such other health care institution and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of the intention.

WE WILL NOT restrain or coerce Women and Infants Hospital, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force Women and Infants Hospital, or any other person from doing business with Intercity Maintenance Company.

WE WILL NOT threaten to picket, picket or by any similar or related conduct which coerces or restrains Massachusetts Bay Community College, or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to force or require Massachusetts Bay Community College, or any other person engaged in commerce or in an industry affecting commerce, to cease doing business with Aid Maintenance Co.

LOCAL 254, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Laura A. Sacks, Esq., for the General Counsel.
Gabriel O. Dumont Jr. and John D. Burke, Esqs., of Boston, Massachusetts, for the Respondent.
Kristen L. Cooney, Esq., of Providence, Rhode Island, for the Charging Party, Aid Maintenance Co., Inc.
Henry G. Stewart, Esq. (Palmer & Dodge), of Boston, Massachusetts, for the Intervenor, Massachusetts Bay Community College.

DECISION

STATEMENT OF THE CASES

ARTHUR J. AMCHAN, Administrative Law Judge. These cases were tried in Boston, Massachusetts, on October 21–24, 1996. The charge in Case 1–CC–2497 was filed on March 30, 1995, by Women and Infants Hospital (the Hospital), Providence, Rhode Island.¹ It alleges that Local 254, Service Employees International Union, AFL-CIO (Respondent) violated Section 8(b)(4) (i) and (ii) (B) of the National Labor Relations Act (the Act) in picketing the Hospital to

¹ All dates are in 1995 unless otherwise indicated.

force it to cease doing business with its janitorial contractor, Intercity Maintenance Company. On March 31, the Hospital filed a charge in Case 1–CG–48 alleging that Respondent also violated Section 8(g) of the Act in failing to provide 10 days' notice of its intent to engage in such picketing. The complaint issued by the Acting Regional Director for Region 1 in these matters was on May 5, 1995.

On November 13, 1995, Aid Maintenance Company, Inc. filed the charge in Case 1–CC–2523. As amended, it alleges that Respondent violated Section 8(b)(4)(i) and (ii)(B) in threatening to picket and in picketing at the Massachusetts Bay Community College (MBCC) campuses in Wellesley and Framingham, Massachusetts, in order to force MBCC to cease doing business with Aid Maintenance Co. Inc. (Aid Maintenance). Aid Maintenance is under contract with MBCC to provide janitorial services at both campuses. The complaint in this case was filed on January 29, 1996.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Intervenor, Massachusetts Bay Community College, I make the following

FINDINGS OF FACT

I. JURISDICTION

Women and Infants Hospital is an inpatient and outpatient treatment center located in Providence, Rhode Island. It annually derives revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5000 directly from entities located outside of Rhode Island. I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Sections 2(14) and 8(g) of the Act.

Aid Maintenance Company, whose principal office is in Pawtucket, Rhode Island, provides janitorial services to numerous businesses in New England. It performs services in excess of \$50,000 outside of the State of Rhode Island and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Massachusetts Bay Community College is a political subdivision of the State of Massachusetts and therefore not an employer within the meaning of the Act. However MBCC is a "person" within the meaning of Sections 2(1) and 8(B)(4)(i) and (ii)(B).

Respondent, Local 254 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Cases 1–CC–2497 and 1–CG–48: Local 254's
Picketing at Women and Infants Hospital*

On the morning of Thursday, March 30, 1995, 12 to 20 pickets associated with Local 254, and led by General Organizer Donald Coleman, appeared at Women and Infants Hospital in Providence, Rhode Island. The Union had not provided prior notice to the Hospital that the picketing would occur. The pickets were stationed on three sides of the Hospital's main building on the sidewalks bordering the parking lot. Some of the signs they carried proclaimed "Women and Infants Ticks Us Off" at the top and contained a picture of a large bug below it. Others read, "We demand respect." The signs also mentioned the pickets' disapproval of Inter-

city Maintenance Company (Intercity) which provided janitorial services to the Hospital but not at the main building itself.

Leaflets were distributed that made it clear that Local 254's dispute with the Hospital was that it had contracted with Intercity. For example, one stated, "Women and Infants Ticks Us Off" at the top. However, it went on to state that Intercity Maintenance Company is an infestation that sucks the blood of Latino workers because Intercity does not pay a living wage, holiday pay, or health insurance. It also proclaimed that Intercity exposes its cleaners to chemical and biological hazards (G.C. Exh. 3).

One of the buildings at which Intercity employees worked was diagonally across the street from the main building. The others were located a block or two away (G.C. Exh. 8; Tr. 98).² Respondent's organizer, Donald Coleman, had been informed that Intercity employees worked exclusively at locations other than the main building. He obtained this information from Stan Israel, an official of SEIU Local 1199, which represents employees of the Hospital. Coleman called Paul Kennedy, a manager of the Hospital's engineering department, to determine whether the information he received from Israel was accurate. Kennedy apparently told him that Intercity delivered laundry and messages for him (G.C. Exh. 6).³

After the picketing commenced, Victor Lima, a field representative for the Union, told hospital personnel that the pickets were at the Hospital to protest its contract with Intercity and that the Union wanted Intercity's presence at the Hospital terminated (Tr. 119). Several pickets told Marilyn Walsh, the Hospital's vice president for human resources, that they intended to stay at the Hospital until it ceased using Intercity's services.

Although Intercity did not clean the Hospital's main building, some of its supplies, such as bag liners, hand soap, and paper goods were kept there. Hospital staff may also have used Intercity employees as couriers to take messages from the main building to other buildings. Intercity employees came to the main building until March 31, 1995, when the Hospital told Intercity not to send its employees to the main building any more. Picketing at the main building continued

²Intercity employees worked primarily at night. However, at least one worked during the daytime when the picketing occurred.

³During the hearing there was some testimony regarding a letter (G.C. Exh. 5) sent to Respondent by the Hospital and whether it had been received by the Respondent. Although, the contents of the letter and its receipt are not important to my resolution of the alleged violation, I make the following factual determination in the event the Board deems it necessary to resolve the matter on other grounds.

On March 31, 1995, the Hospital's attorney sent Edward Sullivan, Local 254's business manager, a letter which stated:

This letter is to inform you that Intercity Maintenance Co. does not perform work or have employees present at Women & Infants Hospital, 101 Dudley Street, Providence, Rhode Island.

Despite Coleman's testimony that he does not recall whether he received the letter, its receipt is established by an affidavit he executed on April 4, 1995 (G.C. Exh. 6). On p. 5 of the affidavit he states that "[o]n about March 31 the Union received a letter from the Hospital." The affidavit identifies the letter as Exh. 3 to the affidavit, a designation which appears at the bottom of G.C. Exh. 5 [G.C. Exh. 5 was also identified as G.C. Exh. 7. There is no G.C. Exh. 7]. This letter, I find, was received by the Union on or about the day it was sent.

on March 31 and April 3-5 (Monday-Wednesday of the following week).

On Friday, April 7, 1995, Respondent distributed a leaflet thanking Women and Infants employees and patrons for their support (G.C. Exh. 4). The leaflet stated that Respondent had agreed to cease its "public activities" in response to notification from Hospital Vice President Walsh on April 5, that Intercity had no employees working at Women and Infants.

B. Case 1-CC-2523: Local 254's Activities at Massachusetts Bay Community College

Massachusetts Bay Community College (MBCC) has 3500 students at two campuses in Wellesley and Framingham, Massachusetts. It employs 130 faculty members and other professional staff as well as tradesmen such as electricians and maintenance personnel. It contracts for such items as food service, snow removal, some security personnel, and cleaning of its buildings.

In the past 16 years MBCC has had three to four different cleaning contractors. The cleaning contract has been awarded to a new contractor generally every 4 to 5 years. In October 1994, the cleaning contract was awarded to Aid Maintenance Company, a nonunion firm based in Pawtucket, Rhode Island. Local 254 has taken strong exception to MBCC's contractual relationship with Aid Maintenance.⁴ It claims that Aid has failed to comply with several statutes regarding wages and working conditions, as well as immigration laws. It apprised MBCC of Aid's obligation to pay a prevailing wage rate under Massachusetts law and Aid's failure to post a performance bond required in the contract bidding documents.

In its initial contract Aid charged MBCC on a hourly basis. Local 254 lobbied the college not to renew its contract with Aid. When the contract was bid for the fiscal year beginning July 1, 1995, it was awarded to Aid Maintenance on a fixed price basis.⁵ On June 30, the day after the contract was awarded, Edward Sullivan, Local 254's business manager, called Laurie Taylor, MBCC's dean for administrative services. Sullivan told Taylor that MBCC could expect pickets if it did not cease doing business with Aid Maintenance.

On July 5, 1995, Dean Taylor met with Victor Lima, a field representative of Local 254. Lima told her that if the college did not cancel its contract with Aid Maintenance there would be a picket line at the college the next day. He handed Taylor a note which stated, "Re: Aid Maintenance. There will be a picket line Thursday morning in front of entrance" (G.C. Exh. 14). Representatives of the Union appeared at the pedestrian entrance of the Wellesley campus on July 6, carrying signs and handing out leaflets. The signs carried messages such as "We demand respect," "Aid Maintenance sucks Latino blood," "Aid Maintenance is anti-Latino," and "Aid is a bloodsucker."

Local 254 continued to display placards and hand out leaflets at both the Wellesley and Framingham campuses from July 6 to Thanksgiving 1995 (Tr. 153, 618-622, 642-643). Representatives of the Local returned to distribute leaflets for

⁴Local 254 objects to any company doing business with Aid Maintenance and it has picketed other Aid customers.

⁵At the time of the hearing the contract for fiscal year 1996-1997 had not been awarded. Aid Maintenance's 1995-1996 contract had been indefinitely extended.

several days in June 1996. Many of the leaflets attacked the college and its officials, as well as Aid Maintenance. One leaflet, for example, read, "Mass Bay Community College Ticks Us Off." It alleged a number of misdeeds on the part of Aid Maintenance and then asked, "Why Does MASS BAY Subcontract to this Plague?" (Jt. Exh. 7K.) Other leaflets directly attacked college officials. One quoted James Morash, dean of finance and administrative services at Framingham, as saying, "[I]f they were that bad, they wouldn't be in business." Then the leaflet stated, "Well, Mr. Morash . . . They wouldn't be in business if it weren't for dirty grease bags like you!!!" (Jt. Exh. 7B.)

On July 21, 1995, Respondent's organizer, Donald Coleman, met with College Deans Laurie Taylor and James Morash. Coleman told them that Local 254's objective was to get the college to cancel its contract with Aid Maintenance by exerting pressure on MBCC through its students and faculty (Tr. 154-155, also see Tr. 650-652). He indicated to Taylor and Morash that the picketing would continue unless MBCC ceased doing business with Aid.

The Relationship between MBCC and Aid Maintenance Co.

The major thrust of Local 254's defense to the complaint in this matter is that its activities directed towards MBCC were primary rather than secondary in character and that MBCC was a joint employer of the Aid Maintenance janitors who worked at its campuses. This defense is based in large part on the degree of interaction between college personnel and these janitors.

Aid Maintenance, which is based in Pawtucket, Rhode Island, employs over 200 people and has cleaning contracts with about 50 customers. These include Stanley Bostitch Company, which manufactures staples; and Milton Academy, a well-known private school in Massachusetts. Direct responsibility for its contract with MBCC belongs to Russ Bizier, Aid's operations manager, and Manny Viera, one of four road supervisors who reports to Bizier. Viera is responsible for 15 to 20 accounts or customers.

On 10 to 15 of its contracts, Aid employs one or more foremen, whose sole responsibility is to oversee the work of other Aid employees. At the other sites employees work without an on-site supervisor. There are no foremen assigned to either MBCC campus. On its first shift at MBCC (7-1:45 p.m.), Aid has two janitors at Wellesley and one at Framingham. On the second shift (2-8:45 p.m.) there is one janitor at each campus. During the third shift (9-3:45 a.m.) there are three Aid employees at Wellesley and one at Framingham.

Except for occasional visits from Viera and very infrequent visits from Bizier, there are no supervisory personnel from Aid Maintenance at MBCC while Aid employees are working.⁶ On the third shift at Wellesley, Viera has designated Carlos (or Regino) Sequen as his pointman, a position similar to leadman. Sequen is supposed to make sure that the third shift does its job and report to Viera if anybody is not doing their work. There is no indication that MBCC

has been aware of Sequen's status as "pointman" prior to the hearing in this matter.

Viera has also described an employee named Robinson Martinez as "kind of my point man during the day" at Wellesley. Nevertheless, it is readily apparent that most of Aid's employees at Wellesley and Framingham work without any direct supervision from Aid most of the time. Similarly, there are no employees of MBCC that directly supervise these Aid Maintenance employees on a constant basis.

On the other hand, MBCC exercises a degree of control over the Aid Maintenance employees that work on its property. The current fixed price contract requires that one cleaner be on site for each shift when the college is open. The college has required that most of Aid's tasks be performed on the night shift when the college's buildings are empty. (See, e.g., R. Exh. 22.) MBCC has also by contract, reserved the right to remove any Aid employee which it feels is not performing his or her job to the college's satisfaction.

In exercising MBCC's contractual rights, Dean Laurie Taylor has instructed Aid to replace two janitors who worked at Wellesley because they were not able to communicate with college personnel in English. Steve Landers, the assistant director of facilities for the Framingham campus, has instructed Aid Maintenance to change personnel on at least two occasions. In May, 1995, he asked Aid's operations manager, Russ Bizier, to replace a third-shift cleaner, who was observed watching television for 2 hours by a security guard (R. Exh. 1). Landers also asked Bizier to replace the second-shift cleaner in March 1996, as part of an effort to curb petty thefts at the Framingham campus (R. Exh. 19).

As Respondent notes at page 36 of its brief, removal from MBCC results in approximately a 50 percent reduction in an Aid employee's wages—if they are assigned to a different Aid account. This is so because Local 254 has induced the college to insist that Aid pay its employees working at MBCC, a "prevailing wage" as required by Massachusetts law (Tr. 283-285). The prevailing wage is about twice what Aid pays its employees working for other customers.

Prior to July 1, 1995, Aid Maintenance was paid by MBCC on the basis of the number of hours its employees worked. While the contract was on an hourly basis, college administrators, particularly Steve Landers at Framingham, devoted a considerable amount of time and energy to assuring that Aid employees were actually working during the hours for which MBCC was billed. Since June 1, 1995, Aid's contract with MBCC has been a fixed rate rather than an hourly contract. College personnel such as Landers and Philip Russell, associate director of facilities at Wellesley, continue to monitor the performance of Aid Maintenance employees to determine whether Aid is performing its services in accordance with its contract.

Additionally, college administrators have recurring direct contact with the Aid Maintenance janitors working at both campuses. MBCC provides a beeper to one janitor on the first and second shifts at the Wellesley campus. College personnel use the beeper to contact Aid Maintenance janitors in order to direct them to clean up spills and clean or stock a restroom with supplies. There is conflicting testimony as to how often Aid cleaners were directed to do specific tasks by college personnel. A former Aid cleaner named Jose Cruz testified that when he worked the second shift at Wellesley, Dean Taylor beeped him three to four times a day. Taylor

⁶Viera generally visits both MBCC campuses every Wednesday. He meets with college administrators and with Aid's first-shift employees. He has visited the second- and third-shift cleaners only two to three times in the past year.

testified she probably summoned Cruz on a total of three to four occasions during the entire 2-month period he last worked the second shift. I cannot completely credit the testimony of Cruz regarding to the frequency that he received direction from Taylor.

However, I do find that Aid employees were directed to clean spills, stock bathrooms, or perform similar “emergency” tasks by MBCC personnel at least several times a week, and possibly on a daily basis. In addition to the direction received by Taylor, Aid Maintenance employees were asked to perform specific tasks by other college officials on both the first and second shifts at Wellesley and Framingham. (See, e.g., the testimony of Steve Landers at Tr. 524–528 and Phil Russell at Tr. 593.) There is no evidence that MBCC personnel directed Aid employees as to how their work was to be performed to any significant extent.⁷

On the other hand, the supplies for the janitors at MBCC are provided by Aid Maintenance. When supplies run low, the janitors contact Aid’s road supervisor, Manny Viera. One janitor on each shift usually contacts Viera daily, so that he has assurance that the proper number of Aid employees are at the MBCC campuses for every shift and that their work has been accomplished. Janitors at MBCC are hired, fired, and disciplined by Viera.⁸ He also determines the shifts for Aid personnel at MBCC—subject to the college’s right of refusal.

Respondent also points to MBCC’s use of cleaner’s sign-in sheets as an indicia of MBCC’s status as a joint employer (R. Br. at 48–50). MBCC has utilized a separate sign-in sheet for janitors for many years. The time at which a janitor signed in is in many cases verified by an MBCC security officer. When Aid’s contract was hourly, these sign-in sheets were checked by MBCC to determine whether it was receiving the service for which it was paying. Since the contract was awarded on a fixed rate basis, MBCC has made very limited use of these sheets. They may be used to check cleaners’ hours for special events for which MBCC is still billed hourly. They may also be used for reference to determine who is in the building in the case of an emergency and in assisting MBCC in determining whether Aid is paying its employees the prevailing wage. In some respects they appear to be kept largely as a vestige of the prior cleaning contracts.⁹

⁷I use the qualification “to any significant extent” because Dean Taylor did, for example, instruct Aid employees to put dust covers over the fire alarm sensors before buffing the floors. She did this so that the dust would not activate the alarms (Tr. 246–247). There are also provisions in Aid’s contract as to when and how certain tasks, such as window washing are to be performed. I do not believe that this involvement in how Aid employees performed their tasks is sufficiently significant to make a difference in determining whether or not MBCC is a joint employer of these janitors.

⁸Respondent at p. 37 of its brief notes that Philip Russell, MBCC’s associate director of facilities at Wellesley, testified that he has hired Aid Maintenance employees. Although the transcript does indicate this at Tr. 585, LL. 21–24, I am certain from the context of the question and record as a whole that either Russell misunderstood the question or that his answer was incorrectly transcribed.

⁹Landers was obviously confused when answering a question about his use of the sign-in sheets after July 1, 1995 (Tr. 545). I find that there is no substantial evidence that any significant use has been made of the sheet since that date—except as noted above.

III. ANALYSIS AND CONCLUSIONS

A. Respondent Violated Section 8(b)(4)(i) and (ii)(B), and 8(g) at Women and Infants Hospital

Respondent concedes that it violated Section 8(g) of the Act in failing to provide the Hospital with 10 days’ notice of its picketing (R. Br. at 3). Thus, the remaining issue before me is whether the picketing also violated Section 8(b)(4)(i) and (ii)(B).

Section 8(b)(4) makes it an unfair labor practice for a labor organization or its agents

(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . .
(B) forcing or requiring any employer or self-employed person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, process, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Victor Lima, a field representative of Respondent, admitted to hospital personnel that the objective of its picketing at Women Infants Hospital was to pressure the hospital to cease doing business with Intercity Maintenance Co. This is also apparent from the context in which the picketing occurred.

I infer that Coleman was aware from his conversations with Israel and Kennedy that Intercity’s activities at the main building were minimal. This strengthens the inference that the objective of the picketing was to pressure the hospital to cease doing business with Intercity. That this was the Union’s intent is also indicated by its leaflet of April 7, 1995, announcing fulfillment of its objectives (G.C. Exh 4).

Respondent argues that it did not violate Section 8(b)(4) because it complied with the criteria for lawful common situs picketing set forth by the Board in *Sailors Union (Moore Dry Dock Co.)*, 92 NLRB 547 (1950). However, compliance with these criteria do not make picketing lawful per se. To the contrary, these standards are merely tools for determining whether picketing is primary or secondary. *Teamsters Local 83 (Allied Concrete)*, 231 NLRB 1097 (1977). Picketing that is secondary violates the Act. Where other evidence, such as an admission of the Respondent, establishes that picketing is intended to force a secondary employer to cease doing business with the primary employer, the picketing violates Section 8(b)(4)(i) and (ii)(B) regardless of whether the *Moore Dry Dock* criteria have been complied with. *General Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 254–55 (1972).

Moreover, Respondent did not comply with *Moore Dry Dock*, supra. In that case the Board held that common situs

picketing directed at the primary employer must meet the following standards:

1. The picketing must be limited to times when employees of the primary are on the secondary employer's premises.
2. At the time of the picketing the primary employer must be engaged in its normal business at the situs.
3. Picketing must be limited to places reasonably close to the situs;
4. The pickets must clearly disclose that the dispute is with the primary employer alone.

Respondent picketed the main building. Intercity's normal business is cleaning buildings. It engaged in its normal business only at the satellite locations. The fact that supplies were stored at the main building and that Intercity employees may have been utilized occasionally to take messages and/or laundry to and from that building, does not establish that Intercity engaged in its normal business at that site.

The fact that one of the buildings cleaned by Intercity was diagonally across the street does not render Respondent's picketing compliant with the third condition set forth in *Moore Dry Dock*. In applying the *Moore Dry Dock* standards, the controlling consideration for the Board has been to require that the picketing be conducted so as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees. *Electrical Workers IBEW Local 970 (Intertox America)*, 306 NLRB 54, 57-58 (1992). The record indicates no reason why picketing could not have been confined to the buildings cleaned by Intercity. Thus, picketing in front of the main building is not reasonably close to the site of the dispute as contemplated by the *Moore Drydock* decision.

Finally, the Union did not make it clear that its dispute was with Intercity alone. The picket signs in prominently proclaiming that "Women and Infants ticks us off" were intended to create the impression that Respondent's dispute was with the Hospital. For the reasons stated above, I conclude that Respondent violated Section 8(b)(4)(i) and (ii)(B), as well as 8(g), in picketing at the main building of Women and Infants Hospital between March 30 and April 5, 1995. Further, I conclude that Respondent's leafleting, to the extent that it was done in conjunction with its illegal picketing, also violated Section 8(b)(4)(i) and (ii)(B). *Teamsters Local 315 (Santa Fe)*, 306 NLRB 616, 631 (1992).

B. MBCC is not a Joint Employer of the Aid Maintenance Janitors Working at its Campuses

In *Laerco Transportation*, 269 NLRB 324, 325 (1984), the Board framed the joint employer issue:

The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

The Board concluded that Laerco was not a joint employer of employees provided to it by CTL, a company in the business of supplying labor to the trucking and warehousing industry. CTL employees worked at Laerco warehouses and other sites. As in the instant case, CTL sent no supervisors to the Laerco sites and CTL employees were supervised to some extent by Laerco. However, the Board in concluding that Laerco was not a joint employer found that this supervision, although sometimes daily, was minimal and of an extremely routine nature.

In *Southern California Gas Co.*, 302 NLRB 456, 461 (1991), the Board declined to find Southern California Gas, to be a joint employer of janitorial employees on its property. As in the instant case, the janitorial company sent no supervisors to the site. The Board concluded that the cleaning company's leadman was its supervisor.

The Board opined that a finding of joint employer status is warranted where the customer "meaningfully affects matters related to the employment relationship, such as hiring, firing, discipline, supervision and direction." It concluded that the record in *Southern California Gas* demonstrated only rare instances of direction of janitorial employees by Gas company personnel, which it deemed insufficient to characterize Southern California as a joint employer. Instead it considered the instances of gas company supervision as steps taken to assure receipt of contracted services and to prevent disruption of its own operations. The Board placed some significance on the fact that the janitorial company had contracts with other businesses.

However in *Holyoke Visiting Nurses Assn.*, 310 NLRB 684 (1993), the Board found the customer of a temporary labor agency to be a joint employer. The decision was enforced by the United States Court of Appeals for the First Circuit which rejected the argument that the case could not be meaningfully distinguished from *Laerco Transportation, Holyoke Visiting Nurses Assn v. NLRB*, 11 F.3d 302, 306-397 (1st Cir. 1993). The court approvingly cited the Sixth Circuit Court of Appeals' observation that a slight factual difference between two cases might tilt a case towards a finding of joint employment.

Among the factors which caused the Board to find joint employment in *Holyoke (HVNA)* were the following:

HVNA had the right to refuse to accept the services of any O'Connell employee it did not want.

HVNA could effectively remove an O'Connell employee from any of its sites.

The Association retained the right to schedule, assign, and direct O'Connell employees.

Holyoke's supervisors not only had the right to give directions to and assign O'Connell's employees; they did so.

O'Connell nurses reported to HVNA supervisors at the end of each day and contacted HVNA supervisors if there was a problem with any patient.

Many of these factors are present in the instant case, although not necessarily to the same degree. It is also important to note that in the *Holyoke* case neither the Board nor the court of appeals found it dispositive that HVNA did not direct the manner in which O'Connell nurses performed their tasks or that O'Connell had contracts with businesses other than HVNA.

One distinction between *Holyoke* and the instant case is that there the two companies in question employed the same types of employees. Holyoke Visiting Nurses Association (HVNA) and O'Connell, the labor referral agency with which it contracted, both employed nurses. Other factors distinguishing Holyoke from the instant case are that O'Connell nurses and HVNA nurses received the same breaks and lunch periods. Also O'Connell nurses got their supplies from HVNA. I would also note that it was a complaint from HVNA to O'Connell that led to the adverse action against the charging party. She was thought to have joined a protest by unionized nurses of HVNA. A complaint from HVNA to that effect led O'Connell to refrain from referring her to HVNA for a period of almost 2 weeks.

I conclude that the instant case is closer to the situations in *Laerco Transportation*, supra, and *Southern California Gas Co.*, supra, than to the *Holyoke Visiting Nurses* case. The contractual provisions affecting when work must be performed are not indicia of joint employer status. It is not surprising that MBCC would require that cleaning be done at times most convenient for the college, or that a cleaner be available at all times to handle emergencies. This does not give the college the type of control over individual employees that indicates an employer-employee relationship.

Similarly, the direct supervision of Aid employees by college officials was limited to assuring that it received contracted services, or situations posing an immediate disruption of MBCC's operations. Thus, Dean Taylor asked cleaners to clean up spills immediately to prevent students, staff, or visitors from getting hurt, rather than going through Aid's headquarters in Pawtucket. Likewise, Steve Landers directed cleaners to stop tasks that interfered with the passage of students to their classes.

Recurring direction of cleaners by college personnel was necessitated by the absence of on-site supervision from Aid Maintenance. However, the Board in *Southern California Gas Co.*, supra, has rejected this as a dispositive factor. Recognizing that this is a matter of degree I conclude that the extent of MBCC's control over Aid Maintenance employees was not sufficient to make MBCC their joint employer.

C. Respondent Violated Section 8(b)(4)(ii)(B) at MBCC

Prior to the appearance of the pickets, the Union through Edward Sullivan and Victor Lima threatened college officials that they would picket if MBCC continued to do business with Aid Maintenance. These threats violate Section 8(b)(4)(ii)(B) regardless of whether picketing actually took place.

Respondent denies that it engaged in picketing at MBCC (Tr. 639); I conclude, however that its activity at the college campuses did constitute picketing. On their arrival at MBCC Local 254 representatives carried and wore signs and passed out leaflets at the entrances to student parking lots, pedestrian entrances to the college, and at a car pool entrance (Tr. 153, 618-622, 642-643). Respondent's activities are similar in some respects to those in *Service Employees Local 399 (Delta Air Lines)*, 293 NLRB 602 (1989), which is cited at page 33 of Respondent's brief. As in the *Delta Air Lines* case, there is no indication that Local 254 either intended or caused interruptions in deliveries to MBCC or refusals to work by employees of MBCC or any other person. However, in the *Delta* case the union's activities were limited to

handbilling while here they included activities which constitute picketing under Board case law.

Local 254's stated objective in the instant case was to induce MBCC students and faculty to apply pressure to the college to cease doing business with Aid Maintenance. However, there is no indication that Respondent's message was limited to students and faculty either by virtue of the location of the picketing or by the content of Respondent's message.

Picketing has been defined as conduct "which may induce action of one kind or another irrespective of the nature of the ideas which are being disseminated," *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993), citing *Teamsters Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring). The carrying and/or wearing of signs and placards places Respondent's activities beyond the mere dissemination of ideas. Whether intended or not, the signs may induce action by employees or students without regard to their message. Thus, Respondent's activities at MBCC—at least prior to Thanksgiving of 1995—were prohibited by section 8(b)(4)(ii)(B).

Finally, Donald Coleman's threat of July 21, to continue picketing unless the college ceased doing business with Aid, independently violated Section 8(b)(4)(ii)(B).

D. Respondent Did Not Violate Section 8(b)(4)(i)(B) at MBCC

There is no evidence that Respondent's signs, placards, or handbills urged either employees or students not to enter MBCC's campus buildings. There is also no evidence that Respondent sought to encourage any employee of the college or of any supplier of goods or services to the college to either strike or not make deliveries to the college. From the leaflets in the record it does not appear that Local 254 was urging anyone to act other than the college officials responsible for the contract with Aid Maintenance. Therefore, I recommend dismissal of the 8(b)(4)(i)(B) allegation at MBCC, *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB at 745 fn. 92.

CONCLUSIONS OF LAW

1. By failing to provide 10 days' notice to Women and Infants Hospital and the Federal Mediation and Conciliation Service of its intent to picket the Hospital, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(g) and Section 2(6) and (7) of the Act.

2. By picketing at the Women and Infants Hospital between March 30 and April 5, 1995, in order to force the Hospital to cease doing business with Intercity Maintenance Company, Respondent violated Section 8(b)(4)(i) and (ii)(B).

3. By handbilling at Women and Infants Hospital in conjunction with illegal picketing as set forth in paragraph 2, above, Respondent violated Section 8(b)(4)(i) and (ii)(B).

4. Massachusetts Bay Community College (MBCC) is not a joint employer of janitorial employees of Aid Maintenance Company who work at MBCC.

5. By threatening on June 30 and July 5, 1995, to picket Massachusetts Bay Community College unless it ceased doing business with Aid Maintenance Co., Respondent violated Section 8(b)(4)(i) and (ii)(B).

6. By picketing Massachusetts Bay Community College (MBCC) between July 6, 1995, and late November 1995, in

order to coerce MBCC into ceasing to do business with Aid Maintenance Co., Respondent violated Section 8(b)(4)(ii)(B).

7. By threatening on July 21, 1995, to continue its picketing at MBCC unless the college ceased doing business with Aid Maintenance, Respondent violated Section 8(b)(4)(ii)(B).

8. Unless specifically found, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Although the General Counsel seeks a broad order,¹⁰ I do not think such an order has been shown to be appropriate in the instant cases. A broadly worded cease-and-desist order is warranted if a respondent has demonstrated a "proclivity" to violate the Act or if a respondent has engaged in "such egregious or widespread misconduct so as to demonstrate a general disregard for . . . fundamental statutory rights." *Iron Workers Local 378 (N. E. Carlson Construction)*, 302 NLRB 200 (1991); *Hickmott Foods*, 242 NLRB 1357 (1979).

Although the instant cases are part of broader campaign by Local 254 aimed at certain nonunion cleaning contractors, I have no basis on the record before me for concluding that its activities at other locations violate the Act. Therefore, I do not find that Respondent has demonstrated a "proclivity" to violate the statute. The only instance of which I am aware that Respondent has violated section 8(b)(4)(i) and (ii)(B) previously is *Service Employees Local 254 (Janitronic, Inc.)*, 271 NLRB 750 (1984). This instance of misconduct is too remote in time from the instant proceeding to support a finding that Respondent has a proclivity to violate the Act, *Operating Engineers Local 12 (Hensel Phelps)*, 284 NLRB 246 fn. 2 (1987).

Similarly, I conclude that Respondent's conduct does not evidence such a blatant disregard of the Act to be sufficiently egregious to warrant a broad order. This case is distinguishable from *Service Employees Union Local 77 (Thrust IV)*, 264 NLRB 628 (1982). In that case the union evidenced a complete disregard for whether its activities complied with the law by continuing to picket the entire jobsite after being informed that the primary employer used only a reserved gate. In the instant case, Respondent had some legitimate reasons to question the information it received regarding the work locations of Intercity employees. Indeed, the Hospital's letter to Respondent of March 31, 1995 (G.C. Exh. 5), is ambiguous, if not somewhat misleading. It could be read as claiming that Intercity employees did not work at any location controlled by Women and Infants Hospital, which was not true. Given this confusion and the Union's cessation of picketing on April 5, 5 days after it started, I think a broad order is not warranted by Respondent's conduct at Women and Infants Hospital.

Likewise, I find the Union's conduct at MBCC to be insufficiently egregious to warrant a broad cease-and-desist order. Given the Board's decision in *Holyoke Visiting Nurses*

¹⁰By "broad order" I assume the General Counsel means an order extending to primary employers other than Intercity and Aid Maintenance, *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 NLRB 106, 107 (1963).

Association, supra, Respondent had a reasonable argument for the proposition that MBCC was a joint employer of Aid Maintenance employees. Although I have found otherwise, the Union's position was not frivolous and, therefore, I conclude that a broad order is not warranted on the basis of its activities at the college alone or in conjunction with its activities at Women and Infants Hospital, see, e.g., *Iron Workers Local 118 (Tutor-Saliba Corp.)*, 285 NLRB 162 fn. 2 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Local 254, Service Employees International Union, AFL-CIO, Boston, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Engaging in any strike, picketing, or other concerted refusal to work at Women and Infants Hospital, or any other health care institution, without notifying, in writing, Women and Infants Hospital, or such other health care institution and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

(b) Inducing or encouraging, by picketing, or any other similar means, any individual employed by a person engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of his or her employment to perform services, where an object thereof is to force Women and Infants Hospital, or any other person to cease doing business with Intercity Maintenance Co.

(c) Restraining or coercing Women and Infants Hospital, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force Women and Infants Hospital, or any other person from doing business with Intercity Maintenance Co.

(d) Threatening to picket, picketing, or any similar or related conduct which coerces or restrains Massachusetts Bay Community College, or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to force or require Massachusetts Bay Community College, or any other person engaged in commerce or in an industry affecting commerce, to cease doing business with Aid Maintenance Co.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Boston, Massachusetts copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places in-

¹¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cluding all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-

ployees and former employees employed by the Respondent at any time since March 30, 1995.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.