

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

Advice Memorandum

DATE: January 28, 2008

TO : Alan Reichard, Regional Director
Region 32

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

SUBJECT: United Food and Commercial Workers Union,
Local 5 (Farmer Joe's Marketplace),
Case 32-CP-490

578-2025-6700
578-8075-0100

This case was submitted for advice as to whether the Union's demonstration and bannerling across the street from the Employer's premises constituted unlawful picketing in violation of Section 8(b)(7)(C).

We conclude that although the Union's September 19 demonstration and bannerling presents a close question under current Board law and the General Counsel's theory of violation in bannerling cases, it would not effectuate the purposes and policies of the Act to issue complaint in this Section 8(b)(7)(C) case. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

The Employer operates two supermarkets specializing in produce and organic foods in Oakland, California. One supermarket is on MacArthur Boulevard (the MacArthur store) and the other is on Fruitvale Avenue (the Fruitvale store). The employees of these stores are not represented by a union.

On January 26 and May 18, 2007,¹ UFCW Local 5 (the Union) engaged in recognitional picketing determined by the Region to be in violation of Section 8(b)(7)(C). Specifically, during the January 26 rally, 100-150 people gathered in the private walkway in front of the Fruitvale store and adjacent parking lot. There was chanting, noise-making, and speeches. There was no patrolling and no picket signs, but the large number of people congregated obstructed ingress and egress to the parking lot. The May 18 rally began at the MacArthur store, with about 50-60 participants patrolling in a circle across the parking lot entrance. The rally later moved to the Fruitvale store,

¹ All dates are in 2007.

where it grew to about 100 people. There, participants patrolled in a large circle crossing the entrance to the driveway and the entrance to the store. There were no picket signs at either store; participants patrolled, chanted, and handed out leaflets. During both rallies, the large number of people congregating near, or patrolling across, entrances obstructed access to the stores.

On August 17, the Region issued complaint alleging that the Union's picketing on these days violated Section 8(b)(7)(C). On September 6, Advice issued telephonic authorization, followed by written memorandum, to initiate Section 10(1) proceedings to obtain a temporary injunction against the Union's conduct if it did not provide written assurances that it would cease its unlawful picketing. On September 8, the Union signed a proposed settlement agreement resolving this conduct. However, on September 19, before the Employer had decided whether to enter into the settlement, the Union held another demonstration across the street from the Fruitvale store.

From 5:00-6:30 p.m. on September 19, a group of 30-40 Union demonstrators chanted (including through use of a bullhorn) and marched in a circle on the sidewalk across the street from the Fruitvale store. None of the demonstrators carried picket signs. There were, however, two stationary banners, four feet tall by six feet wide, upon which was written, "Boycott Farmer Joe's."²

Fruitvale Avenue, on which Farmer Joe's is located, is a large commercial street that is 66 feet wide. There are two lanes of traffic, one in each direction, and one row of parked cars on either side of the street. The demonstrators stayed on the sidewalk across Fruitvale Avenue from the store, and thus were, at a minimum, 66 feet from the parking lot entrance to the store. The entrance to the store itself is another 50 feet from the parking lot entrance.

The Union has not engaged in further conduct since the September 19 rally. On December 5, the Union provided the Region assurances that it would "not be taking any further action at Farmer Joe's for an extended period of time well into next year." The Region also understands that the Union sent a letter to the Employer disclaiming interest in representing its employees.

² An Employer witness also stated that there were four individuals handbilling in the Employer's parking lot during this time.

ACTION

We conclude that although the Union's September 19 demonstration and bannering presents a close question under current Board law and the General Counsel's theory of violation in bannering cases, it would not effectuate the purposes and policies of the Act to issue complaint in this Section 8(b)(7)(C) case. The Region should therefore dismiss the charge, absent withdrawal.

Section 8(b)(7)(C) of the Act prohibits a union from picketing an employer with a recognitional object without having filed a representation petition within a reasonable period of time, not to exceed thirty days from the commencement of the picketing. Because the Union did not engage in traditional picketing on September 19, its conduct must have been sufficiently confrontational, and thus the functional equivalent of picketing, as a predicate to a Section 8(b)(7)(C) violation.³ Under the General Counsel's theory of violation in bannering cases, the following four factors may create a sufficient degree of "confrontation" to constitute the functional equivalent of picketing: (1) the display of large banners; (2) the presence of individuals supporting the banners; (3) the close proximity of the banners to the targeted neutral employer; and (4) misleading language on the banners.⁴ Thus, the General Counsel has alleged as picketing union bannering which confronted individuals needing to access the neutral's property.⁵

³ See Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965) (citation omitted) ("[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises"). See also United Mine Workers, District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 217-18 (1969), *enfd.* 76 LRRM 2828 (7th Cir. 1971) (union engaged in unlawful Section 8(b)(7)(C) picketing by massing large numbers of individuals at approaches to employer's premises).

⁴ For a fuller explication of the General Counsel's bannering theories, see, e.g., Carpenters Locals 184, et al. (Grayhawk Development), Cases 28-CC-971, et al., Advice Memorandum dated August 17, 2004. Although most of the prior bannering cases involved allegations under Section 8(b)(4), the theory of violation would apply in Section 8(b)(7) cases as well. See, e.g., Southwest Regional Council of Carpenters (Okland Constr. Co.), Case 27-CP-156, Advice Memorandum dated June 22, 2006.

Similarly, the Board held in United Mine Workers, District 12 (Truax-Traer Coal Co.),⁶ that a union's confrontational conduct at the approaches to an employer's jobsite, without the use of traditional picket signs, can constitute the functional equivalent of picketing for purposes of Section 8(b)(7)(C). In Truax-Traer, the union made good on a threat that it would close down the employer's job unless it signed a contract by posting 200 individuals and lining 100 cars on both sides of the street leading to the employer's jobsite.⁷ To avoid injuries, the employer closed the job.⁸ The union's action in Truax-Traer of posting a large number of individuals at the approaches to the employer's site, was thus sufficiently confrontational to convey its message to employees to stay out, without the need for traditional pickets and patrolling.⁹

This case presents a close question of violation under both the General Counsel's banner theory as well as the Board's decision in Truax-Traer. In this regard, the Union's demonstration and banners were visible and audible to customers as they turned into the Employer's parking lot. However, it is not clear that the Union's demonstration created a confrontation with the Employer's customers so as to constitute picketing for purposes of Section 8(b)(7)(C).¹⁰ Thus, the Employer's customers were

⁵ See, e.g., Southwest Regional Council of Carpenters and United Brotherhood of Carpenters & Joiners, Local 1506 (Aesthetic Surgery, P.C.), Case 28-CC-1005, Advice Memorandum dated April 10, 2006 (banner activity violated 8(b)(4)(ii)(B) where banner was 200 feet from the entrance to the neutral's parking lot and visitors driving to the neutral's facility had to pass the banner to access the parking lot).

⁶ 177 NLRB 213, 217-18 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971) (absence of picket signs or patrolling not determinative; union picketed in violation of Section 8(b)(7)(C) when it posted large numbers of individuals standing or sitting along road leading to construction site).

⁷ See id. at 215, 217-18.

⁸ Id. at 218.

⁹ Id.

¹⁰ There is no evidence or contention that the Union's handbilling in the Employer's parking lot lost its

not required to cross the banners or patrolling demonstrators to access the Employer's store; indeed, customers turned away from the rally and banners in order to enter the store's parking lot.¹¹ Rather, the 30-40 protesters and two stationary banners were across a two-lane street from the Employer's store, buffered by a row of parked cars on either side, and 66 feet from the entrance to the parking lot and over 100 feet from the store's entrance. In contrast to the Union's earlier conduct in January and May, the participants did not block ingress or egress to the Employer's store. And, unlike in Truax-Traer, where the employer closed down to avoid physical confrontation between union members and its employees, the Employer remained open while customers entered the store and shopped.¹²

Moreover, the Union's conduct lasted only 90 minutes on one day and has not been repeated. The Union has assured the Region that it has no plans to engage in further conduct and has thus far kept that promise. Finally, the Union signed a settlement agreement resolving its earlier unlawful conduct. In these circumstances and given the closeness of the violation, it would not effectuate the purposes of the Act to issue complaint in this case.

Accordingly, the Region should dismiss the charge, absent withdrawal.

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protection under Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988). In these circumstances, we would not conclude that the Union's lawful handbilling rendered the demonstration across the street coercive.

¹¹ Compare Carpenters Local 971 (Pinecrest Construction and Development), Case 32-CC-1510-1, Advice Memorandum dated April 26, 2004 (placement of banner created gauntlet effect because there was no alternative access to site, and banner was visibly displayed on a corner through which all consumers doing business with neutral had to pass).

¹² Compare Truax-Traer, 177 NLRB at 218.