

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

Advice Memorandum

DATE: March 30, 2018

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: SEIU Healthcare 1199NW (Providence Hospice 506-0184
and Home Care of Snohomish County) 506-9000
Case 19-CB-211211 536-1200
536-2506
SEIU Healthcare 1199NW (Providence Regional 536-2509-9900
Medical Center–Everett)
Case 19-CB-211219

These cases were submitted for advice as to whether the Union violated Section 8(b)(1)(A) by sending picketers to the lobby of a hospice care center, located on an upper level of a hospital, during a strike. We conclude that the appearance of picketers in the Employer’s lobby arguably caused a sufficient disturbance, especially considering the tranquil environment characteristic of a hospice setting, so as to violate Section 8(b)(1)(A), and that the Region should issue complaint, absent settlement, to present the Board with this unusual factual situation.

FACTS

Providence Regional Medical Center–Everett (“Medical Center”) operates acute care medical facilities in Washington State. Its Colby Campus facility leases space on the eighth floor to Providence Hospice and Home Care of Snohomish County (“Employer”). SEIU Healthcare 1199NW (“Union”) has represented most of the Employer’s non-supervisory professional and nonprofessional staff at this campus since May 2016, and the parties have since been bargaining for an initial contract. The Union does not represent any employees of the Medical Center.

On December 6, 2017, the Union commenced a strike against the Employer.¹ Early that morning, a group of about five to eight people, comprised of employees and at least one Union representative, entered the Medical Center and took the public

¹ The Region has already determined that the Union complied with the applicable strike notice requirements.

elevators to the Employer's care center on the eighth floor while carrying picket signs. This elevator bank is used by family and visitors to access the Employer's space. Bed-bound patients are transported via a different set of elevators. Employees can use either set of elevators to report to work.

Shortly after the picketers exited the elevators and stepped into a small lobby area, two managers who had been at a nurses' station a short way down the hall approached the group. The managers explained to the group that they could not be in a patient care area. A picketer replied that the group needed to start, i.e. set up the picket, as close to the Employer's space as possible, since the employees are not employed by the Medical Center. The managers reiterated their concern and then asked the group to step aside to let a grieving family pass by to use the elevators. The group moved aside, but indicated that they were waiting for some of the night staff to join them at the end of their shifts. One of the managers asked the group to wait in a small space to the side of the elevators, which staff refer to as the "library." The group headed toward the "library" and the managers returned to the nurses' station to attend to patient issues. At least one employee who had worked overnight joined the group. When the managers returned to the "library" to speak with the group about five minutes later, the group had already left. Shortly after this incident, picketing commenced on sidewalks outside of the Medical Center.² There is no evidence that the group engaged in any loud or disorderly conduct while entering and exiting the Medical Center.

ACTION

We conclude that the Region should issue complaint, absent settlement, to present the Board with the question of whether this kind of brief indoor picketing—or at least attempted picketing—is sufficiently coercive to rise to the level of a violation of Section 8(b)(1)(A), especially where it occurs inside a medical facility.

A union's conduct violates Section 8(b)(1)(A) where it has a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights.³ The test is an objective one, and a finding of a violation does not depend on evidence that a particular employee was actually restrained or coerced.⁴ Proof of actual

² The Region has already determined that the outdoor picketing did not violate Section 8(b)(4).

³ *E.g., Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 815 (2001), *enforced*, 50 F. App'x 88 (3d Cir. 2002) (unpublished decision).

⁴ *Id.*

intent to coerce also is not required, although such evidence would support finding a violation.⁵

Although picketing, by itself, is generally not considered coercive within the meaning of Section 8(b)(1)(A),⁶ there is very little law regarding indoor picketing, particularly in circumstances such as those presented here. Board law does prohibit union tactics that involve “violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.”⁷ And, Section 8(b)(1)(A) not only prohibits a union’s restraint and coercion of statutory employees, but also threats or other acts of intimidation directed at non-employees where employees would be likely to witness or learn of the conduct “because they may reasonably conclude that if they do not support the union’s goals, like coercion will be inflicted upon them.”⁸

The Board has also acknowledged that, when union agents enter a workplace against an employer’s wishes, there is the potential for intimidation of employees. For example, a Section 8(b)(1)(A) violation occurs if union agents seize an employer’s premises or so disrupt operations that it serves as a show of strength to employees.⁹

⁵ *Id.*; *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 148 (1997).

⁶ *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 290 (1960) (peaceful recognitional picketing by minority union was outside the scope of Section 8(b)(1)(A)). Of course, peaceful picketing may violate Sections 8(b)(4) or 8(b)(7), which prohibit secondary picketing and recognitional picketing in certain specified circumstances.

⁷ *Id.*

⁸ *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1061 (2003). *See also, e.g., Casino Royale*, 323 NLRB at 159-60 (finding picketers’ statements to spouse of employee, security guards, and manager did not violate the Act, notwithstanding that statements constituted threats of bodily harm, since no evidence employees witnessed or heard about incidents).

⁹ *See Bartenders Local 2 (Zim’s Restaurants)*, 240 NLRB 757, 762, 773-74 (1979) (violation where union agents and others entered a restaurant on three occasions in disregard of management’s protests; visits disrupted operations, served as a show of power to employees, and caused employees to risk termination by stopping work at the union’s behest); *Allou Distributors*, 201 NLRB 47, 47, 55-56 (1973) (invasion of warehouse by six union agents to compel employees to withdraw decertification petition violated Section 8(b)(1)(A) where they told employees to stop work and generally created the impression that they controlled the premises); *District 65*,

Likewise, a violation occurs when employees are prevented from reporting to work or obstructed from carrying out their work tasks, thereby taking away their choice of withholding support from the union by continuing to work in the face of a strike or some other appeal for assistance.¹⁰

In *Gimbel Brothers, Inc.*,¹¹ the Board found a Section 8(b)(1)(A) violation where, as part of a union campaign to achieve 100 percent membership in the union, agents surrounded sales clerks on the selling floor, together with the customers they were trying to serve, and maintained a loud, continuing commotion.¹² The Board noted that such “indoor picketing” interfered with the employee-customer relationship by disturbing rapport and oral communication, and forced the employees to stop work “almost as effectively as if they had placed gags over their mouths or had pinioned their arms.”¹³ Accordingly, the Board concluded that the

Retail, Wholesale & Department Store Union (B. Brown Associates, Inc.), 157 NLRB 615, 618-19, 623 (1966) (intrusions by 10 to 25 union agents and members for organizational purposes, during which the union caused production to come to a “standstill,” violated Section 8(b)(1)(A) because “employees, observing that the employer cannot withstand the force of the union, naturally conclude . . . that they too should yield to the union’s wishes”), *enforced*, 375 F.2d 745 (2d Cir. 1967).

¹⁰ See *Electrical Workers Local 98 (Tri-M Group, LLC)*, 350 NLRB 1104, 1105-08 (2007) (violation where area standards pickets moved from their stations to stand in front of a dumpster, thereby preventing employee of nonunion subcontractor from dumping construction debris for thirty minutes), *enforced*, 317 F. App’x 269 (3d Cir. 2009) (unpublished decision); *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 740, 752 (2004) (union organizer unlawfully stationed vehicle in a position that blocked employee of nonunion contractor from dumping waste for fifteen to thirty minutes), *enforced*, 251 F. App’x 101 (3d Cir. 2007) (unpublished decision). *But see Retail Store Employees Local 428 (Levitz Furniture)*, 204 NLRB 1046, 1048-50, 1051-52 & n.15 (1973) (no violation where up to five union agents repeatedly entered a retail store for up to two hours and interacted with employees and managers where there was no more than a “momentary interruption” of the salespersons’ work, i.e., no more than a “few minutes”).

¹¹ 100 NLRB 870 (1952).

¹² *Id.* at 876-77, 893-96.

¹³ *Id.* at 877.

union's conduct was "very different from mere moral pressure orally exerted upon non-striking employees by a picket line at a plant entrance."¹⁴

In the instant matter, we conclude that the appearance of picketers in the Employer's lobby arguably caused a sufficient disturbance, especially considering the tranquil environment characteristic of a hospice setting, so as to violate Section 8(b)(1)(A), and the Board should be given the opportunity to evaluate this unusual factual situation.¹⁵ Although we have found no cases directly on point, we find that the Union's picketing (or, at least, attempted picketing) inside the Employer's lobby arguably exerted more pressure on employees to join the strike than a typical picket line because it occurred inside a hospice care center rather than outside an entrance. The Board has recognized that conduct inside a medical facility may have a heightened coercive impact on employees.¹⁶ Any employees who observed the picketers congregated in the Employer's lobby could have reasonably been alarmed that the Union was disturbing, or planned to disturb, the tranquil atmosphere necessary to care for the infirm. Thus, employees could have interpreted the Union's actions as a threat to their Section 7 right to continue working in the face of the strike, even absent "any actual physical obstruction," as in *Gimbel Brothers*.¹⁷

¹⁴ *Id.*

¹⁵ We note that the issue here is not whether the employee picketers' conduct was protected concerted activity, but rather whether the Union violated Section 8(b)(1)(A) by conducting this picketing. Therefore, although the General Counsel disagrees with the Board's decision in *Capital Medical Center*, 364 NLRB No. 69 (Aug. 12, 2016) (finding off-duty employee picketing outside a hospital entrance protected), that decision is not implicated in the instant case.

¹⁶ See *Staten Island University Hospital*, 339 NLRB at 1061 (finding a union agent's series of open confrontations with non-employees in a hospital violative of Section 8(b)(1)(A) where her intrusions into "sensitive patient areas . . . far exceeded the usual behavior in that setting").

¹⁷ 100 NLRB at 877. The Region should also rely on *UNITE HERE! Local 5 (Aqua-Aston Hospitality, LLC)*, 365 NLRB No. 169, slip op. at 1 n.2, 10 (Dec. 16, 2017), where, in addition to finding at least ten separate incidents of blocking for several minutes at a time, the ALJ noted that it was reasonable to assume that non-strikers were restrained, even if they were not targeted by the pickets, because they would have seen or heard the picket line commotion and redirected themselves away from the front of the hotel. Although that case is distinguishable because the Union in the instant case did not actually block passage to the elevators, it could support finding a violation here because it is reasonable to assume that any employees who

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by its conduct in the Employer's lobby area.¹⁸

/s/
J.L.S.

ADV.19-CB-211211.Response.ProvidenceHospice (b) (6), (b) (7)

tried to report to work using the public elevators while the picketers were speaking with the managers would have been confronted with the unusual commotion in the eighth floor lobby and may have declined to exit the elevator as a result.

¹⁸ We agree with the Region that the Union did not coerce or restrain employees of the Medical Center merely by having the group walk through the hospital lobby and use its public elevators.