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CONFIDENTIAL

Note: This letter is exclusively for clients. Necessarily the suggestions and recommendations contained herein are general in nature. They should not be acted upon without further consultation with our office. The sole purpose of the letter is to direct your attention to current developments which may require revision of your contract clauses or readjustment of your existing practices.

PICKETING BY MINORITY UNIONS UNDER THE NEW ACT.

What can a union do, under the 1959 Reporting and Disclosure Act, when faced with a hostile employer whose employees, for one reason or another, will not lend their support? Its alternatives are drastically limited by Section 8(b)(7), which prohibits picketing for recognition (1) where the employer has lawfully recognized another union, or (2) where an election has been held within one year, or (3) where the picketing continues without an election being filed within a reasonable time, not to exceed thirty days. Nevertheless, it is not entirely without recourse.

First, Section 8(b)(7) prohibits "picketing" only, so that the union is free to use means of communication other than picketing to tell its story. Clearly it may advertise in newspapers, or by radio, or by letter. And probably, though this question has not been authoritatively decided, it may pass out handbills at the employer's premises.

Second, unless the employer has lawfully recognized another union, or unless an election has been held within one year, the union is free to picket for recognition so long as it, or someone, files an election petition within a "reasonable time", not to exceed 30 days. In only a few cases has the N. L. R. B. moved against recognitional picketing within the 30-day period. Once the petition is filed, picketing can probably continue until the election is held.

Third, and most important, the union may picket for purposes other than "recognition" or "organization". The N. L. R. B. has displayed a tendency to assume that any picketing by a minority, uncertified union must be for those purposes, but not all courts have agreed. One Federal Circuit Court, in the Stork Club case, has held that even where a union engages in unlawful recognitional picketing it may change its objective, withdraw its de-

mand for recognition, and picket for informational purposes only. And the Federal District Court in San Francisco has ruled that where a union disclaims any intent to enter into a contract unless a majority of the employees authorize the union as their bargaining representative, and pickets with signs addressed to the public, announcing that the employer does not provide union wages and conditions, it does not violate the Act. Here again, the Court disregarded pre-picketing demands for a contract on the ground that such demands had been withdrawn. (Brown v. Department Store Employees).

In those cases which have upheld the right of unions to picket for informational, as distinguished from recognitional, purposes, the courts have relied upon a proviso to Section 8(b)(7) which expressly permits picketing or other publicity for informational purposes (truthfully advising the public that an employer does not employ members of or have a contract with the union) unless an effect of such picketing is to induce any employee not to work. Under a literal interpretation of 8(b)(7), if a union is not picketing for recognitional purposes it need not rely upon the proviso as a defense to its activities, and it should be free to induce employees. But the cases decided so far have held that even if a union is picketing for informational purposes only, it must conform to the proviso limitations. In these cases, however, the courts were convinced that the union's ultimate goal was recognition and contract. If a union were to disclaim any intent to reach a contract, and seek merely the payment by a non-union employer of union wages and conditions, in order to prevent unfair competition, it may be that a court would permit it to induce employees by its picketing.

Finally, it should be kept in mind that neither the Board nor the courts are authorized to grant damages for violations of Section 8(b)(7); the only remedy provided for is a cease and desist order. Since the Section is new and its interpretation is still fluid, the field is open for a union to test the Section's application by engaging in activity which it believes to be proper and lawful.

SUGGESTED "SUCCESSORS AND ASSIGNS" CLAUSE

A California District Court of Appeals has ruled that the typical union contract clause to the effect that "this contract shall be binding upon the successors and assigns of the Employer" does not, in fact, bind the purchaser of an employer's business, unless that purchaser himself agrees to be bound. In view of that decision, it is now desirable to include a clause making the Employer responsible for observance of the terms and conditions of the contract until the assignee agrees to assume that obligation. Following is a clause which may be used for that purpose:

Suggested "Successors and Assigns" Clause

This Agreement shall be binding on any successor or assignee of the Employer. The Employer shall make the written assumption of the obligations of this contract a condition of any succession, sale, or assignment, and he shall remain responsible and liable for the observance of all the terms and conditions of this agreement including the payment of wages and fringe benefits unless and until the successor or assignee executes and delivers to the Union a written assumption of the obligations thereof.

ARBITRATOR HOLDS EMPLOYER CANNOT PREVENT EMPLOYEE FROM HOLDING SECOND JOB SO LONG AS IT DOES NOT INTERFERE WITH HIS WORK.

In a recent arbitration between I. B. E. W. Local 1245 and P. G. & E., arbitrator Herbert Blumer ruled that the Company could not discharge an employee who insisted, against Company directions, upon working part-time as a bartender. The Company had known for some time that the employee involved was working at a bar during evenings, but it made no objection until the employee was arrested and convicted as an accomplice in the maintenance of gambling devices on the premises. Then the Company insisted that the employee give up his bar job, and, when he refused, they discharged him from employment. The Company asserted two reasons for their position: first, the unfavorable publicity resulting from the gambling incident, and second, the interference of the bar job with the employee's work for P. G. & E., which might result from long hours, drinking with customers, and unavailability for emergency work. As to the first point, the Arbitrator found no evidence that the employee's continued work at the bar would result in unfavorable publicity for the Company. And as to the second, he found there was no actual evidence that the employee's work for P. G. & E., had been hampered, and reasonable doubt that such interference would result. Consequently, he ruled the discharge was improper and ordered reinstatement with back pay.

BUILDING TRADES COUNCIL HELD TO VIOLATE ACT BY PICKETING TO FORCE GENERAL CONTRACTORS TO AGREE NOT TO USE NON-UNION SUBS.

In Louisiana, a Building Trades Council picketed general contractors to secure their agreement to deal only with sub-contractors who agreed to be bound by the applicable craft contract. A Federal District Court granted an order to restrain the picketing on the ground that the proposed agreement would violate Section 8(e) of the Taft-Hartley Act, added by the 1959 amendments. Section 8(e) prohibits contracts whereby an employer agrees to cease or refrain from doing business with any other person. The

Court apparently did not consider a proviso to Section 8(e) which states that it will not apply "to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction ..."

In a similar recent case, a federal Court of Appeals has ruled, though on the basis of the Act prior to the 1959 amendments, that a building trades council commits an unfair labor practice when it engages in picketing to enforce its agreement with a general contractor which purported to make the terms of the agreement, including a union shop clause, applicable to subcontractors as well. Since the general contractor was doing business with a non-union sub, the Court ruled, the union's picketing violated Section 8(b)(4)(A), which prohibits the inducement of employees of a neutral employer to cease work in order to force that employer to cease doing business with another. The existence of the contractual limitation on sub-contracting, according to the Court, did not validate the picketing.

On the basis of these cases, any agreement limiting sub-contracting must be carefully drawn, so as to (1) bring it within the proviso to Section 8(e), and (2) provide for effective sanctions in the event of breach so that resort to picketing for enforcement will not be necessary.

SUPREME COURT UPHOLDS RIGHT OF TRANSIT EMPLOYEES TO STRIKE

Reversing the judgment of a Trial Court the State Supreme Court this week ruled that employees of the publicly owned Los Angeles Transit System have a right to strike under the statute creating the Los Angeles Metropolitan Transit Authority. Normally, the Court said, the public employees do not have a right to strike, but the Transit Act provided that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." The right to engage in "concerted activities" includes the right to strike, and the statute was deemed constitutional as so interpreted. Chief Justice Gibson wrote the opinion of the Court, from which Justices Schauer and McComb dissented.

Charlie 4-6-79 3.2

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PLEASE REPLY TO CHICO

April 6, 1979

Mr. Dean Cofer, Business Manager
I.B.E.W. Local Union No. 1245
Post Office Box 4790
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Re: UTILITY REPORTER Article

Dear Dean:

Enclosed is the article you requested in your letter of April 3, 1979, for this month's UTILITY REPORTER. I assume it will make it to you in advance of the April 12, 1979 deadline. I tried to be brief but the article turned out long anyway. Therefore, you or Dorothy may want to edit it. While this is an important question, it is in fact "extremely complex". It would take a book to fully discuss the subject. I have attempted to present an outline, emphasizing the risks and concluding with an admonition to the members to contact the Local Union before doing anything. I think the most important message we can get out to the members is that both they and the Union can get in trouble in these situations so they should seek advice before taking any actions. I did not even attempt to address the issue of injunctions or no injunctions (i.e., Boys Market and Buffalo Forge).

Obviously, this article relates primarily to P G & E's situation. However, I tried to write the article from a general approach, encompassing most, if not all, of the Local Union's properties (hope that is okay).

If you need anything further, please just call.

Best personal regards,

MARSH, MASTAGNI & MARSH

HARRY M. MARSH

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CAN LOCAL UNION 1245 MEMBERS REFUSE TO CROSS ANOTHER UNION'S PICKET LINE?

Whether or not a Local Union 1245 member can refuse to cross another union's picket line is a complex question which, in the final analysis, is dependent upon the particular facts presented. However, as a general rule it is against the law for a union or its members to refuse to perform work for an employer that is engaged in a labor dispute with another union. Such conduct constitutes what is commonly called secondary activity, and is prohibited.

These matters actually occur in two different general situations: (1) Picket lines established by some other union on property or premises operated or controlled by the Local Union 1245 member's employer; and (2) Picket lines established by some other union on property or premises not operated or controlled by the Local Union 1245 member's employer (i.e., a picket line on non-P.G.& E. property at which a Local Union 1245 P.G.& E. member is required to perform work).

As a matter of federal law, an employee has a limited "right" to observe a picket line at the premises of another employer if the employees of such employer are engaged in a strike ratified or approved by a union which is a statutory bargaining representative of such employees. However, it has been held that this right is confined only to a prohibition of discrimination based upon union activity. In other words, under most circumstances, the employer has a right to insist that the involved employee perform his job and failure to do so (whether as a result of refusal to cross a picket line or otherwise) can result in the employee's temporary or permanent replacement.

As a practical matter, this type of situation often occurs where the picketed employer is not the premises owner or operator, but rather some other employer (i.e., a general or sub contractor) performing work on the premises. In these instances, what is commonly referred to as a second gate is almost always immediately established. Under this two-gate system,

a separate entrance is established for the employees of, and those having business with, the employer being struck. All others on the job site are directed to a separate identified entrance. Under these circumstances, the striking employees must confine their picketing to their designated entrance and the uninvolved employees must, in essence, cross the picket line by entering at the other entrance.

Irrespective of the owner or operator of the premises or the existence of segregated entrances, the aforementioned right of employees to observe other unions' picket lines is narrowly limited to cases of discrimination as discussed above. Further, many of Local Union 1245's agreements provide for continuity of work performance and do not expressly recognize the right to observe other unions' picket lines. In these cases, refusal to cross such a picket line would constitute a violation of the agreement itself. While discipline or discharge for such refusal would, in most instances, be subject to the grievance and arbitration process, it is impossible to predict what an arbitrator would rule in these cases. Each case would be dependent upon the particular facts as well as the individual arbitrator involved. It should, however, be emphasized that a Local Union member's refusal in these circumstances would certainly involve a risk to the member.

If the other union's pickets are directed to a strike against the same employer as the involved Local Union 1245 member, said member's rights to respect the picket lines, and protections afforded for his or her failure to do so, would in most instances be dependent upon the provisions of the applicable collective bargaining agreement. In these circumstances, a critical factor would be the existence or non-existence of a prohibition against such sympathy strikes in the Local Union 1245 agreement. If such a prohibition exists either directly or by implication, the involved member could be subjected to discipline under the applicable agreement.

It should be emphasized that this opinion assumes that the picket line and work action of the other union is both sanctioned and lawful. Obviously, the opinion would be different in the event of non-sanctioned and/or unlawful

pickets. Further, this opinion assumes that the Local Union 1245 member is employed by a private employer. Public employee members of Local Union 1245 would be taking a considerable risk in refusing to cross a picket line under any circumstances, given the present direction of the law in the State of California.

In conclusion, it can be seen that this issue is a complex one potentially subjecting the Union and the involved member to serious consequences (it should be emphasized that Local Union 1245 can be subjected to various sanctions for such activities of its members if the same are found to be prohibited). Therefore, every member should consult the appropriate staff member of the Local Union before making any decisions relating to these matters or actually engaging in any conduct.

Prepared by
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