

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

Advice Memorandum

DATE: November 30, 2006

TO : Celeste Mattina, Regional Director
Region 2

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

SUBJECT: Restaurant Opportunities Center of New York 177-3901
(Redeye Grill) 536-2563-0100
Case Nos. 2-CP-1067; 2-CB-20643 548-0100
578-4025-5000

Restaurant Opportunities Center of New York
(Fireman Hospitality Group Café Concepts, Inc.)
Case Nos. 2-CP-1071; 2-CB-20705

Restaurant Opportunities Center of New York
(65th Street Restaurant LLC d/b/a Restaurant Daniel)
Case Nos. 2-CP-1073; 2-CB-20787

The Region submitted these cases for advice on whether: (1) Restaurant Opportunities Center of New York (ROCNY) is a labor organization under Section 2(5) of the Act; (2) ROCNY's conduct to force the Employers to enter into lawsuit settlement agreements that set numerous terms and conditions of employment is recognitional picketing in violation of Section 8(b)(7)(C); (3) ROCNY's conduct constitutes attempts to force representation on employees absent majority support in violation of Section 8(b)(1)(A); and (4) ROCNY's conduct seeks to force the Employers to discriminate against employees on the basis of ROCNY membership in violation of Section 8(b)(2).

We conclude, based on the record before us, that ROCNY is not a labor organization under Section 2(5). We further conclude that, even if ROCNY were a labor organization, its proffer of lawsuit settlement agreements and picketing to encourage lawsuit settlement do not violate Section 8(b)(7)(C), 8(b)(1)(A), or 8(b)(2).

1. **The evidence does not establish that ROCNY is a labor organization**

Section 8(b) applies only to a "labor organization" or its agents. Section 2(5) defines a labor organization as an organization in which employees participate and that exists for the purpose, at least in part, of "dealing with employers" over grievances, labor disputes, or terms and conditions of employment. It is undisputed that ROCNY is an organization in which employees participate. Thus, it easily meets the first requirement of labor organization status. However, as most of ROCNY's activities consist of social advocacy, legal services, and job-support services for restaurant workers that do not fall within the purview of Section 2(5), the question is whether, in its role as legal advocate, ROCNY's attempt to settle employment discrimination claims has constituted "dealing with" the Employers over terms and conditions of employment under Section 2(5).

The Board and the courts have taken an expansive view of what constitutes a labor organization.¹ The "dealing with" requirement has been defined broadly -- an organization may satisfy the "dealing with" requirement without formally bargaining for a collective-bargaining agreement.² What is required is a "bilateral mechanism" of proposals from the group or organization, "coupled with real or apparent consideration of those proposals by management."³ However, the required element of dealing only exists when the bilateral mechanism of offer and consideration of proposals entails a "pattern or practice" that extends "over time."⁴ An isolated instance of exchanging proposals, or a single attempt to deal with an employer over a discrete issue does not establish a pattern or practice of dealing.⁵

¹ See, e.g., NLRB v. Cabot Carbon Co., 360 U.S. 203, 211-14 (1959); Sahara Datsun, Inc. v. NLRB, 811 F.2d 1317, 1320 (9th Cir. 1987); Electromation, Inc., 309 NLRB 990, 993-96 (1992), enf'd 35 F.3d 1148 (7th Cir. 1994)..

² Cabot Carbon, 360 U.S. at 213-14.

³ Electromation, 309 NLRB at 995 n.21.

⁴ E.I. Du Pont De Nemours & Co., 311 NLRB 893, 894 ((1993)

⁵ See, e.g., Vencare Ancillary Services, Inc., 334 NLRB 965, 969-70 (2001), enf. denied on other grounds, 352 F.3d 318 (6th Cir. 2003) (no pattern or practice of dealing where

Although entities other than traditional unions can certainly constitute Section 2(5) labor organizations, and ROCNY's lawsuit settlement negotiations with the Employers here, particularly Restaurant Daniel (Daniel), could arguably be considered "dealing" within an expansive interpretation of Section 2(5), we conclude, based on the evidence before us, that ROCNY's conduct has not been shown to constitute a pattern or practice of dealing over time. Rather, ROCNY's attempts to negotiate settlement agreements with the Employers here were discrete, non-recurring transactions with each Employer. The parties' discussions were limited to settling legal claims raised by employees. Granted, the parties' discussions stretched over a period of time. But the settlement of lawsuits is not generally something that can be accomplished in a single meeting. Although stretching over a period of time, the parties' dealings were limited to a single context or a single issue -- resolving ROCNY's attempts to enforce employment laws. Nothing in the tentative agreement discussed by the parties implies an ongoing or recurring pattern of dealing over employment terms and conditions, beyond the resolution of the current dispute. Indeed, even the subjects that were explicitly left open-ended in the proposed agreement with Daniel, such as Daniel's new promotion policy and language policy, were intended to be developed by Daniel in conjunction with the EEOC, without further input from ROCNY.

This is the case even with regard to the arbitration provisions in the proposed settlement agreement with Daniel. These provisions, which allow the parties to raise alleged contract violations for adjudication by a third party for the effective period of the settlement agreement,⁶ are merely contract enforcement mechanisms that do not imply a continuing practice of "dealing." They do not entail further "back and forth" between the parties, nor do they contemplate any bilateral offer or consideration of new proposals. Rather, the arbitration provisions are strictly adjudicatory enforcement mechanisms that do not involve any

employee group coalesced and acted on a single issue in an "isolated incident"); Vons Grocery Co., 320 NLRB 53, 53-54 (1995) (no pattern or practice where there was only one incident in which committee made proposals to management); Stoody Co., 320 NLRB 18, 20 (1995) (same).

⁶ We note that there is no contention that the proposed length of any of the proposed settlement agreements is unrelated to the discrete disputes at issue here.

further "dealing" under Section 2(5).⁷ For all these reasons, we conclude that ROCNY's attempts to settle the discrimination claims present here were discrete incidents that do not establish a pattern of dealing over time and, thus, that ROCNY has not been shown to be a Section 2(5) labor organization.

Significantly, this conclusion is consistent with the determinations of the United States Department of Labor (DOL)⁸ and the Internal Revenue Service (IRS),⁹ both of which consider ROCNY to be a charitable organization, not a labor organization.

Therefore, absent evidence that ROCNY has engaged in a pattern of dealing with employers over time, rather than discrete instances of lawsuit-settlement negotiations arising out of charges with a federal law enforcement agency, we conclude that ROCNY is not a Section 2(5) labor organization,¹⁰ and that all pending charges against ROCNY should be dismissed, absent withdrawal.¹¹

⁷ See, e.g., Mercy-Memorial Hospital Corp., 231 NRLB 1108, 1121 (1977) (employee committee's adjudicatory function was not "dealing with"); John Ascuaga's Nugget, 230 NLRB 275, 276 (1977), enforcement granted in part, denied in part on other grounds, 623 F.2d 571 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981).

⁸ In August 2004, another employer filed a complaint with DOL alleging that ROCNY was a labor organization subject to LMRDA reporting requirements. After an investigation, DOL determined that ROCNY is not a labor organization under LMRDA. We note that the LMRDA definition of labor organization incorporates the language of Section 2(5) of the Act in that it requires that the organization exist for "dealing with" employers over grievances, labor disputes, and terms and conditions of employment. 29 U.S.C. Sec. 402(i). LMRDA, however, also requires that labor organizations be certified, recognized, or "acting" as the representative of employees. 29 U.S.C. Sec. 402(j).

⁹ In May 2004, ROCNY received charitable organization status under Section 501(c)(3) of the Internal Revenue Code. Although one of the Employers here challenged ROCNY's charitable organization status before the Internal Revenue Service ("IRS") in June 2006, IRS has not revoked ROCNY's tax exempt classification nor contacted ROCNY for an investigation of its activities.

¹⁰ See, e.g., Vencare Ancillary Services, 334 NLRB at 969-70 (group of employees that joined together in response to wage

2. ROCNY's conduct does not violate Section 8(b)(7)(C), 8(b)(1)(A), or 8(b)(2)

Even if it were to be established that ROCNY is a Section 2(5) labor organization, we conclude that ROCNY's picketing in support of lawsuit settlement is not recognitional; thus, the charges in the instant cases should be dismissed on that basis as well, absent withdrawal.

Section 8(b)(7)(C) makes it unlawful for a labor organization to picket an unorganized employer with the goal of either organizing the employer's employees¹² or obtaining voluntary recognition from the employer,¹³ without an election petition being filed within a reasonable period of time not to exceed 30 days.

Here, ROCNY has engaged in mass demonstrations near the entrances to the Employers' restaurants that have included chanting, noisemaking, handbilling, and, at Daniel, picket signs.¹⁴ Although the demonstrators have been mostly confined to defined spaces behind police barricades, instead of patrolling back and forth, at least some of the conduct falls within the Board's definition of picketing.¹⁵ Picketing does not require patrolling; rather, the essential

cuts, presented petition to management, and organized a work stoppage was not a labor organization because their appeals to the employer were geared towards a limited issue and did not establish a pattern of dealing with employer).

¹¹ [FOIA Exemption 5

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¹² See, e.g., Local 3, IBEW (M.F. Electrical Service Co.), 325 NLRB 527, 528 (1998).

¹³ See, e.g., Building Service Employees Union, Local 87 (Liberty House/Rhodes), 223 NLRB 30, 36 (1976).

¹⁴ It is undisputed that ROCNY is responsible for the demonstrations at Daniel, in which signs and handbills with the ROCNY logo have been displayed.

¹⁵ Given our conclusions that ROCNY is not a Section 2(5) labor organization, and that its object was not recognitional, we need not decide here what conduct, if any, at other Employers' restaurants constituted picketing.

feature of picketing is the posting of individuals near entrances to a place of work.¹⁶ In addition, one of the elements of picketing is the creation of " 'a confrontation in some form' " between picketers and the employees, customers, or suppliers of the picketed premises.¹⁷ Because of the presence of crowds near the restaurant entrance, the use of picket signs, and the confrontational chanting and noisemaking, the activity at Daniel has clearly constituted picketing.¹⁸

Moreover, this picketing has taken place on a weekly basis for a period longer than 30 days. Thus, the critical issue is whether ROCNY's picketing has a recognitional object.¹⁹ Recognitional picketing has been defined as " 'any picketing that seeks to establish a union in a continuing relationship with an employer with regard to matters which could substantially affect terms and conditions of employment.' " ²⁰ In determining whether picketing is recognitional, the Board considers the totality of the circumstances, including the language on the picket signs

¹⁶ Mine Workers District 2 (Jeddo Coal Co.), 334 NLRB 677, 686 (2001) (in 8(b)(4) context); United Mine Workers District 12 (Truax-Traer Coal), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971) (8(b)(7)(C) picketing); Lawrence Typographical Union 570 (Kansas Color Press), 169 NLRB 279, 283, enfd. 402 F.2d 452 (10th Cir. 1968) (8(b)(7)(B) picketing).

¹⁷ Chicago Typographical Union 16 (Alden Press), 151 NLRB 1666, 1669 (1965) (quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964) in 8(b)(4) context)

¹⁸ See, e.g., Truax-Traer Coal, 177 NLRB at 218 (congregation of large numbers of union agents around their parked cars near employer entrance was picketing in violation of 8(b)(7)(C)).

¹⁹ The Employers do not contend that the picketing is organizational.

²⁰ IBEW, Local 453 (Southern Sun Electric Corp.), 252 NLRB 719, 723 (1980) (quoting NLRB v. IBEW, Local 265 (RP&M Electric), 604 F.2d 1091, 1097 (8th Cir. 1979)). But see, Nat'l Packing Co. v. NLRB, 377 F.2d 800, 804 (10th Cir. 1967) (recognitional object may be found even where labor organization does not seek to establish a continuing relationship).

and the union's prior and contemporaneous conduct or statements.²¹

In the instant cases, there is no evidence that ROCNY has demanded recognition as collective-bargaining representative of any of the Employers' employees; ROCNY's demands have been limited to negotiating the settlement of the employees' EEOC claims as their legal advocate. At Daniel, for example, the handbills distributed during ROCNY's picketing refer to the claims of racial and national origin discrimination and EEOC litigation. The picket signs protest alleged discriminatory practices, except for a single picket sign that appeared in a few instances that read "Organizing is a Right."²² Thus, the object of the picketing and other conduct, as discerned from the overall circumstances, is to publicize the discrimination claims and pressure the Employers to engage in or resume settlement negotiations.

Daniel has contended that this latter object, to get it to resume settlement negotiations, is the equivalent of forcing it to "recognize and bargain" with ROCNY under Section 8(b)(7)(C). However, the Supreme Court concluded in Cabot Carbon²³ that the term "bargaining" is more limited than the term "dealing with." A finding of "dealing with" by a labor organization does not necessarily establish "recognition and bargaining" under Section 8(b)(7)(C).²⁴

Indeed, in other contexts, we, and at least one federal court, have refused to equate a union's lawsuit activities with representational activities. In UFCW Local 120 (Wal-Mart Stores),²⁵ we concluded that a union's initiation of a

²¹ See, e.g., Graphic Communications Int'l Union Local 1-M (Heinrich Envelope Corp.), 305 NLRB 603, 605 (1991); Liberty House/Rhodes, 223 NLRB at 33.

²² It should be noted that ROCNY routinely uses to term "organizing" to refer to organizing the general community for political and protest activities. Thus, the mere use of this term here does not indicate any desire or intent to unionize the Employers' employees. As noted above, the Employers do not contend that the picketing is organizational.

²³ 360 U.S. at 211.

²⁴ See Nat'l Packing Co. v. NLRB, 377 F.2d at 803.

²⁵ Case 32-CB-5757-1, Advice Memorandum dated October 13, 2004.

class-action wage and hour lawsuit on behalf of unrepresented employees was not the equivalent of forcing representation for collective-bargaining purposes in violation of Section 8(b)(1)(A), relying on the absence of any precedent equating mere legal representation with collective-bargaining representation. In White v. NFL,²⁶ the court concluded that the player's association, which had been decertified, was not acting as the players' collective-bargaining representative by sponsoring various antitrust lawsuits and participating in lawsuit settlement negotiations. Similarly, we conclude here that, merely by seeking settlement of employment lawsuits, even with an ongoing oversight role, ROCNY is not seeking recognition and bargaining under Section 8(b)(7).²⁷

Further, there is no evidence that ROCNY's settlement attempts conceal a recognitional purpose broader than just the settlement of the outstanding legal claims. ROCNY's proposals seem reasonably related to the claims of mass discrimination and disparate treatment raised by employees. They are aimed at fostering job actions based on objective, non-discriminatory bases, giving all employees equal opportunities in job promotions and scheduling, and redressing the alleged underpayment of the "back of the house" positions in which most employees of color (and claimants) are employed. In addition, the proposed arbitration clause is merely an enforcement mechanism like those routinely included in settlement agreements.

²⁶ 822 F. Supp. 1389, 1430-31 (D. Minn. 1993), affd. 41 F.3d 402 (8th Cir. 1994), cert. denied 515 U.S. 1137 (1995).

²⁷ Thus, we need not address whether a finding that lawsuit settlement negotiations constitute "recognition and bargaining" under Section 8(b)(7)(C) would be inconsistent with the Board's and the courts' practice of avoiding interpretations of the Act that raise constitutional conflicts. See generally, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (NLRA should be construed so as to avoid the curtailment of First Amendment rights whenever possible). See also, BE & K Construction Co. v. NLRB, 536 U.S. 516, 532 (2002) (even unsuccessful reasonably-based lawsuits enjoy First Amendment protection); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council, 485 U.S. 568 (1988) (Supreme Court cautioned against broadly interpreting 8(b)(4) to prohibit conduct arguably protected by First Amendment; peaceful handbilling constitutionally protected); Novotel New York, 321 NLRB 624, 633-34 (1996) (union's filing and financing of FLSA lawsuit on behalf of employees was protected by First Amendment; was not objectionable conduct).

Therefore, even if ROCNY were a labor organization, we would dismiss the Section 8(b)(7)(C) allegation because its picketing to encourage settlement of outstanding discrimination claims is not picketing for a recognitional purpose.

Given this conclusion that ROCNY's seeking lawsuit settlements is not the equivalent of seeking recognition and bargaining, even if the settlements would establish certain terms and conditions of employment, we agree with the Region that ROCNY did not attempt to force minority representation on employees in violation of Section 8(b)(1)(A). We also agree with the Region that nothing in ROCNY's settlement attempts or proposed settlement terms would force the Employers to discriminate against employees on the basis of ROCNY membership in violation of Section 8(b)(2).

Accordingly, the Region should dismiss these charges, absent withdrawal, as ROCNY is not a labor organization and, in any case, its conduct does not have a recognitional object.

B.J.K.