

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

.....
DEPARTMENT OF THE ARMY,
U.S. ARMY SOLDIER SUPPORT
CENTER, FORT BENJAMIN
HARRISON, INDIANA

Respondent

and

Case No. 5-CA-90465

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1411, AFL-CIO

Charging Party
.....

Sharon A. Bauer, Esquire
For the General Counsel

Lieutenant Colonel Terry E. Thomason, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The U.S. Army Soldier Support Center at Fort Benjamin Harrison, Indiana (hereafter "the Army") refused to permit the union representing its employees to conduct informational picketing outside the main office building at the fort to protest certain employment practices. This case presents the issue of whether the requested picketing was a protected activity under section 7102 of the Federal Service Labor-Management Relations Statute (the Statute), and whether, therefore, the Army violated section 7116(a)(1) of the Statute, by interfering with its employees' right to engage in a protected activity, when it refused to permit such picketing.

The case was heard in Indianapolis, Indiana, on November 29, 1989. Based on the record, the briefs, and my evaluation of the evidence, I conclude that a violation occurred.

Findings of Fact

The Charging Party (the Union) represents employees in three bargaining units at Fort Benjamin Harrison (Harrison). The largest unit includes approximately 2,200 employees of the U.S. Army Finance and Accounting Center (USAFAC). USAFAC occupies a large office building called Building 1.

On May 19, 1989, after giving advance notice to the Chief of Staff of USAFAC, the Union wrote a request to Major General Woods, the Commander of U.S. Army Soldier Support Center, at Harrison, for permission to picket USAFAC at Coleman Circle, located outside of Building 1. General Woods was the individual responsible for the administration of Harrison.

Harrison is an open facility, with no restrictions on the public's driving through its streets. Coleman Circle is a non-work area located between Building 1 and the street closest to that building.

The Union's request specified that permission was sought for the week of July 17-21, during the hours of 6:30-8:00 a.m., 11:00 a.m.-1:00 p.m., and 3:30-5:00 p.m. The Union claimed the right to engage in informational picketing under the Statute, provided that it did not disrupt the activities of the agency. Previously, the Union had informed William Shultz, the labor relations officer for Harrison, that its purpose in picketing was to protest changes in conditions of employment that USAFAC (allegedly) had implemented without bargaining. Shultz was consulted in the Army's process of responding to the Union's request.

The president of the Union is an employee at Harrison, and there is no evidence that any Union members are nonemployees. I infer that it was understood that the request contemplated picketing only by employees, presumably off duty. At least, no claim has been made that the Army acted under any other assumption, nor did it distinguish in its response between employee and nonemployee picketers.

On June 1, the Adjutant General, for the Commander, denied the Union's request. He provided the following rationale:

In accordance with Department of the Army policy, it has been determined that informational picketing outside the installation

will not result in a traffic hazard or endanger the safety of the employees.

In so responding, the Adjutant General relied on an Army "Clarification of . . . Policy" which stated in relevant part:

1. It is the policy of the Department of the Army that no form of picketing is permitted on military reservations. This includes informational picketing conducted by civilian employees and their unions, even though these employees are in an off-duty status.

2. It is acknowledged that there may be rare instances where certain informational picketing could be permitted on a military reservation if the Commander concludes that other factors (e.g., safety of employees, impact on community relations, traffic hazard, etc.) militate against picketing an installation gate or elsewhere outside the post. Such situations are considered to be the rare exception rather than the rule.

The Union conducted informational picketing outside two of Harrison's entrances, after filing the original unfair labor practice charge that initiated this proceeding.^{1/}

Discussion and Conclusions

The right to publicize a union's position with respect to matters affecting employees' conditions of employment is protected by section 7102. This right includes handbilling

^{1/} Over the objection of Counsel for the General Counsel, I admitted evidence concerning the adequacy of alternative means available to the Union, including its picketing at the entrances, to publicize its labor dispute. With the benefit of the briefs on the merits and further reflection (as explained under "Discussion and Conclusions," below) I have concluded that alternative means have no bearing on the case. Further, the Union adequately explained to the Army the purpose of the picketing, and it is unnecessary to pursue the Union's additional explanation of its purpose through testimony at the hearing.

on quasi-public, non-work areas of a military base, absent a substantiated claim that the handbilling would disrupt the agency's mission. Department of the Air Force, 3rd Combat Support Group, Clark Air Base, Republic of the Philippines, 29 FLRA 1044, 1048-50 (1987) (3rd Combat Support Group). The Army does not assert that, for the purposes of this case, a distinction should be drawn between handbilling and informational picketing, and I see no basis for affording informational picketing any less protection under the Statute. See Veterans Administration, Washington, D.C., and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, Case No. 7-CA-40435 (1985), ALJ Decision Reports, No. 50 (Aug. 2, 1985).

In defense of the prohibition that occurred here, and of the Army's policy of restricting picketing to special and exceptional situations, the Army urges the Authority to adopt the balancing test adopted by the National Labor Relations Board in Jean Country, 291 NLRB No. 4, 129 LRRM 1201 (1988). There, the Board decided that in all "access" cases it would regard the availability of "reasonably effective alternative means as especially significant in the balancing process." Unfortunately for the Army, however, the instant case is not what the Board would regard as an "access" case, nor would it apply that balancing test to situations like this one. This was made clear in NLRB v. Ohio Masonic Home, 892 F.2d 1153 (6th Cir. 1989), enforcing 290 NLRB No. 122 (1988), where the court held that the Board had properly applied its traditional rules concerning employee activities on company property rather than the Jean Country rules, because Ohio Masonic Home concerned the right of employees to picket on the property of their own employer and Jean Country involved access to someone else's property.^{2/}

Stated otherwise, the Board uses a more lenient standard for affording employees the right to conduct otherwise protected activities on their own employer's property than for subjecting another's property--typically the owner of a shopping center in which the employer's store is located--to access by nonemployees of the owner. Thus, in Ohio Masonic Home, the Board applied the standards it had established in Tri-County Medical Center, 222 NLRB 1089 (1976) for determining the validity of an employer's rule that

^{2/} I commend counsel for the Army for his professional integrity in calling this case to my attention. Nor did his client suffer, as I was aware of the case anyway.

restricted access to its property by off-duty employees. The Board stated that it would find such a rule valid only if it:

(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activities. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

No detailed analysis is necessary to conclude that the restriction the Army applied here would not pass muster under the standards that the National Labor Relations Board would most likely apply to a situation such as this -- the Tri-County Medical Center standards. The Army still urges, however, that the Jean Country balancing test, with its emphasis on alternative means, is most appropriate because, as stated in a letter supplementing its brief, "the unique circumstances present on military installations" warrants such an accommodation. But the Authority rejected a similar request for special status for military bases in 3rd Combat Support Group, supra, at 1050, a case which controls here.

To review, one essential teaching of 3rd Combat Support Group is that employees covered by the Statute, including those employed on military bases, have a right to conduct union activities concerning unit employees' conditions of employment in appropriate locations within the Government property of their employing agency or activity, subject only to restrictions necessary to avoid disruption of the agency's mission. The requested location here was appropriate. The Army's restriction was not supported by any such showing of necessity and was therefore unlawful. I conclude that the Army violated section 7116(a)(1) by interfering with its employees' protected right to conduct informational picketing within Fort Benjamin Harrison. I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Indianapolis, Indiana, shall:

1. Cease and desist from:

(a) Interfering with the rights of its employees to engage in activity protected by the Federal Service Labor-Management Relations Statute by refusing to allow the American Federation of Government Employees, Local 1411, AFL-CIO, the exclusive representative of its employees, to conduct informational picketing at Coleman Circle related to their terms and conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at Army facilities at Fort Benjamin Harrison copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of Fort Benjamin Harrison and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing,

within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., August 31, 1990.



JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with the rights of our employees to engage in activity protected by the Federal Service Labor-Management Relations Statute by refusing to allow the American Federation of Government Employees, Local 1141, AFL-CIO, the exclusive representative of its employees, to conduct informational picketing at Coleman Circle related to their terms and conditions of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6303.